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No. 84-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL ROBINSON, *et al.*,

Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,

Respondents.

JOSEPH W. ANTONACCI, *et al.*,

Petitioners.

v.

STATE OF NEW JERSEY, *et al.*,

Respondents.

ALLEN OLSEN, *et al.*,

Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,

Respondents.

Appendices to
Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

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APPENDIX A-1

Opinion of the U.S. District Court
in *Antonacci/ Robinson v. State of New Jersey*, September 28, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL H. ROBINSON, *et al.*,
Plaintiffs.

v.

STATE OF NEW JERSEY, *et al.*,
Defendants.

Civil Action
No. 82-1118

JOSEPH W. ANTONACCI, *et al.*,
Plaintiffs.

v.

STATE OF NEW JERSEY, *et al.*,
Defendants.

Civil Action
No. 82-1119

(Consolidated
Cases)

OPINION
September 28, 1982
Debevoise, District
Judge

I. The Proceedings

These two consolidated actions each challenge the constitutionality of provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, *et seq.* (the Act), which permit public employers to withhold and majority union representatives to receive representation fees assessed against employees who are not members of the union. Plaintiffs moved for preliminary injunctive relief; a hearing was held; and this opinion constitutes my findings of fact and conclusions of law.

II. The Statute

The Act creates a Division of Public Employment Relations within the executive branch, N.J.S.A. 34:13A-5.1,

and establishes in that division a New Jersey Public Employment Relations Commission (PERC), N.J.S.A. 34:13A-5.2. PERC is required "to make rules and regulations" and to implement fully all the provisions of this act". PERC is granted exclusive jurisdiction over unfair practices, N.J.S.A. 34:13A-5.4c. The Act grants and protects the right to freely join or assist or to refrain from joining or assisting any employee organization, N.J.S.A. 34:13A-5.3, and prohibits restraint of those rights, N.J.S.A. 34:13A-5.4(a)(1) & (b)(1).

The Act designates the majority representative the exclusive representative to negotiate the terms and conditions of employment of an employee unit, N.J.S.A. 34:13A-5.3 (¶ 2).

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership . . . In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.
>
> When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

Effective July 1, 1980, New Jersey amended the Act to

permit public employers and majority representatives of employees to negotiate contract provisions which would require employees who choose not to join the majority representative to pay a representation fee in lieu of dues. P.L. 1979, c 477, N.J.S.A. 34:13A-5.5 to 5.9. The purpose of the amendment was to require the non-members to bear a fair share of the expenses incurred in representing their interests during negotiations with their employer. The Sponsor's Statement to Assembly Bill No. 688, February 9, 1978, expressed this objective as follows:

> For many years, the 'New Jersey Employer-Employee Relations Act' has required that a majority representative of public employees which has negotiated a labor agreement covering such employees to represent the interests of *all* employees in the bargaining unit, regardless of organizational membership, without discrimination. Non-members of the majority organization, therefore, enjoy virtually equal benefits and protections without sharing in the costs, incurred by collective negotiations, grievance representation, and other services. In the recent May, 1977 decision of the United States Supreme Court (*Abood et al. v. Detroit Board of Education et al.*) which upheld the constitutional validity of state 'agency shop' legislation, the Court pointed to the fact that the tasks of negotiating and administering an agreement are continuing and difficult ones and entail the expenditure of much time and money, often requiring the services of lawyers, expert negotiators, economists, research staff, as well as administrative personnel. In that decision, the Court went on to state that 'a union shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free-riders'—to

> refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees' [*sic*] Many analysts feel that union security agreements such as the agency shop are vital to the stability and sense of responsibility of public sector unions.

N.J.S.A. 34:13A-5.5(a) authorizes a majority representative and a public employer to include in a collective agreement a provision requiring all employees in the negotiations unit who are not members of the majority representative to pay the majority representative a representation fee in lieu of dues for services rendered by the majority representative. N.J.S.A. 34:13A-5.5(b) provides that the representation fee "shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members *less* the cost of benefits financed through the dues, fees and assessments and available to or benefitting only its members, *but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments*". (Emphasis added.) The Act does not define benefits available to or benefitting only the majority representative's members. However, the Statement of the Assembly Labor Committee to Assembly Bill No. 688, June 19, 1978, referred to the cost of any other benefits available only to members and gave as examples "contributions to charitable or religious organizations or causes; fines, penalties or damages arising from unlawful activities of a bargaining agent; social or recreational activities, costs of educational activities unrelated to collective negotiations, contract administration or lobbying for improved wages and benefits; costs of medical insurance; retirement benefits or other benefit programs; and

costs incurred by the bargaining agent to organize employees who are not included in the bargaining unit".

It would appear that in arriving at the representation fee it is not required (although it would be permissible) to deduct from membership dues the employee's pro rata share of expenditures by the majority representative for political or ideological causes or for lobbying. That subject is covered in N.J.S.A. 34:13A-5.5(c).

That section provides that "[a]ny public employee who pays a representation fee . . . shall have the right to demand and receive from the majority representative . . . a return of any part of that fee paid by him which represents the employee's additional pro rata share of expenditures by the majority representative that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of any other benefits available only to members of the majority representative". A payor of a representation fee does *not* have the right to demand a refund of his pro rata share of "the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the employer". Thus there is potentially a very broad area of lobbying activities for which the funds of non-members can be spent without the right to a refund. This gives rise to one of the areas of controversy in this case.

The public employer deducts the representation fee

from the paychecks of non-members and forwards the deductions to the majority representative. N.J.S.A. 34:13A-5.6.

N.J.S.A. 34:13A-5.6 prohibits the deduction of representation fees unless the majority representative has established and maintained a demand and return system which provides pro rata returns as described in N.J.S.A. 34:13A-5.5(c). The majority representative's demand and return system must include a provision permitting non-members to obtain review of the amount returned through full and fair proceedings. The majority representative bears the burden of proof. N.J.S.A. 34:13A-5.6. If dissatisfied with the result of demand and return system proceedings, a representation fee payer may appeal to a three-member board whose members the Governor appoints with the Senate's advice and consent. N.J.S.A. 34:13A-5.6. One member of this board must be a representative of public employers, one a representative of public employee organizations, and one, the strictly impartial chairman, is the representative of the public interest.

Issues in this case include (i) whether any demand and return system can validate a compulsory non-member fee, part of which is used until the time of its return to promote organizations and causes with which the non-member disagrees and (ii) whether, if some forms of demand and return systems are valid, this particular system is invalid because it places such onerous burdens on the non-member seeking a refund. An examination of the facts developed in the consolidated cases now before the Court throws light upon these issues.

III. Robinson v. New Jersey

Plaintiffs in the *Robinson* case are thirteen professional employees of defendant Rutgers University. They are not members of defendant Rutgers Council, American Association of University Professors (AAUP), which acts as exclusive representative of the employees in the bargaining unit of which plaintiffs are a part.

Defendants in *Robinson* include the State of New Jersey and its Governor, the Chairman of PERC, Rutgers University and its Board of Governors and various of its officers having labor relations duties, the Rutgers Council of AAUP and various of its officers, and the National AAUP and its General Secretary.

Extensive affidavits have been filed by or on behalf of plaintiffs and defendants and there can be little, if any, dispute as to the facts pertinent to the disposition of the application for a preliminary injunction.

AAUP is a national organization of teachers and research scholars in universities and colleges and in professional schools of similar grade. Its governing body is a Council whose members are certain present and past officers, the Chairman of the Collective Bargaining Congress and thirty elected members. The Council establishes membership dues, subject to ratification at the annual meeting of AAUP.

Whenever the active members of AAUP in a given institution numbers seven or more, they may become a chapter of AAUP. A chapter may establish local membership dues.

According to AAUP's chief executive officer, "AAUP is not, and has never been, a national labor organization. It does not engage in collective bargaining on behalf of anyone. In 1973, the AAUP Annual Meeting endorsed collective bargaining as a legitimate way to achieve the Association's goals, and agreed to provide assistance in pursuing collective bargaining to local chapters." (Spitzberg Aff., ¶¶ 3, 4.).

AAUP requires that collective bargaining chapters which collect agency shop fees (representation fees) be required to transmit to the national organization an amount equal to full national dues "or a prorated share based on local assessments" (Spitzberg Aff., ¶ 7). According to AAUP's chief executive officer, "[l]ocal chapters of the AAUP engaged in collective bargaining have full responsibility for the negotiation and implementation of their collective bargaining agreements," but nevertheless "[v]irtually all activities of the AAUP support the efforts of its local chapters engaged in collective bargaining" (Spitzberg Aff., ¶¶ 8, 9).

Be that as it may, an examination of the record demonstrates that National AAUP engages in at least some lobbying at the federal and state levels[1] and that significant funds are spent for activities which the Statement of

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[1] For example, in the October, 1980 issue of AAUP's house organ, Academe, there appeared the following under Report of Committee R on Government Relations, 1979-1980:

> During the five years I have served as chairman of Committee R, I have watched our Association move from a short agenda of legislative issues, primarily related to student assistance programs, to a larger and more comprehensive agenda which now encompasses a broad range of issues involving both the legislative and executive branches of the federal and state

the Assembly Labor Committee to Assembly Bill No. 688, June 19, 1978 gave as examples of benefits available only to members, *e.g.*, costs of educational activities unrelated to collective negotiations and costs incurred to recruit members.

There is a Rutgers Council of AAUP Chapters (Rutgers AAUP) serving as the negotiating representative for faculty members and teaching and graduate assistants at Rutgers, The State University. The constituent chapters of the Council are located at Camden, Newark and New Brunswick. An Executive Council has the responsibility to establish dues subject to approval of the membership.

In early 1980, after enactment of the amendments to the Act but before the effective date of the amendments (July 1, 1980), Rutgers AAUP sought and obtained from

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governments . . . Our collective voice is heard in Congress and the White House and, not surprisingly, we have an impact on policies affecting the academic community. We contribute an important element of expertise to debates over crucial issues involving higher education, and in so doing we have seen a measurable improvement in the quality of both the debate and resultant legislation.

There follows in this single issue of Academe a description of the subjects on which AAUP lobbied, none of which appear to have any direct bearing on the negotiations between Rutgers AAUP and Rutgers University, *e.g.*, the then new federal Department of Education, the FY 1980 and FY 1981 federal budgets, reauthorization by Congress of the Higher Education Act, federal intelligence legislation, amending the National Labor Relations Act to guarantee the right of faculty to organize and bargain collectively. ["We have begun planning the major lobbying effort which will be necessary to win Congressional approval of the legislation."] All of these subjects involve controversies about which faculty members and other citizens can and do have widely divergent views.

its legal counsel advice as to how it should proceed to take advantage of the new provisions. Counsel advised that it would be proper to negotiate an agreement requiring a representation fee provided the agreement did not become effective before July 1, 1980. As to calculating the representation fee, counsel recommended that first it was necessary to compute all dues and other charges assessed against members, including membership dues in the national organization if such membership was required of all members. Then, counsel advised, two categories of expenses had to be deducted to determine what amount could be charged to non-members: (i) amounts spent in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment[2] and (ii) amounts expended for benefits available only to members of the majority representative.

Counsel advised that not all expenses for lobbying activities should be excluded from the representation fee: "Other political activities, of a nonpartisan or nonideological nature should, however, be included. As the bill

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[2] I conclude that N.J.S.A. 34:13A-5.5(b) requires that in computing the representation fee there need be deducted from the amount of the members' dues only the cost of benefits available only to members. The cost of expenditures for causes in aid of activities of a partisan political or ideological nature need not be deducted in the first instance. They are recoverable under the demand and return system provided for in N.J.S.A. 34:13A-5.5(c). Obviously, from the perspective of the nonmember who does not wish to have any portion of his fee used for political or ideological purposes it is preferable that such portion never be taken from him at all rather than having to pay that portion and then having to institute proceedings to compel its return. The procedure recommended by Rutgers AAUP's counsel, while perhaps not mandated by the statute, would have had the effect of avoiding the necessity to pursue the demand and return procedure.

itself notes, chargeable items should include 'the cost for support of lobbying activities designed to foster public policy goals and collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer' . . . [T]he union should not exclude sums spent on such activities as testimony before legislative finance committees, mailings to citizens seeking support of union demands or other political activities directly related to collective bargaining."

To provide guidance to Rutgers AAUP in determining what constituted member-only benefits counsel listed (with two exceptions) the kinds of expenditures which were set forth in the Assembly Labor Committee Statement referred to above. Counsel noted that the statement had listed among the member-only benefits expenses to administer the contract and for lobbying. However, counsel observed that after the presentation of the Assembly Labor Committee Statement the proposed amendment to the Act had been revised specifically to permit such expenses to be included in the representation fee.

Counsel noted that under the statute the representation fee could not exceed 85% of charges to members and then stated: "Experience in other states has demonstrated that an 85% fee is defensible; therefore we suggest that that amount be the established representation fee." This is a somewhat surprising recommendation. The opinion letter had gone on for several pages to urge meticulous record-keeping and had defined carefully just

what expenditures should and should not be included in the representation fee. To then recommend reliance on totally unidentified and unanalyzed "experience in other states" which had proved to be "defensible" seems inconsistent with all the preceding advice.

In any event, in the spring of 1980 Rutgers AAUP prepared to negotiate for contract provisions requiring payment of a representation fee. In May, 1980, before such an agreement had been negotiated, the Rutgers AAUP Council adopted a budget for fiscal year 1980-81 based entirely on member revenue. The budget anticipated total revenues of $167,500 from which there was deducted $45,000 representing National AAUP dues, for net revenues for the use of Rutgers AAUP of $122,500. Total expenditures were projected at $125,879.

In early June Rutgers AAUP's Executive Director advised the President and President-Elect that an "expanded" budget should be prepared in anticipation of receipt of additional revenues, in the form of representation fees; that expenditures should be separated so as to identify those benefitting members-only and those benefitting all persons in the bargaining unit, and that a representation fee should be established.

In response to the Executive Director's suggestions committees were appointed to make recommendations as to a revised dues structure and as to a new budget which would reflect the receipt of representation fees. These two committees reported to the Council's July 30, 1980 meeting.

The budget committee anticipated that $157,100 would

be received in representation fees (almost doubling the income projected in the May, 1980 budget) and proposed how that amount should be spent. It proposed adding to the May membership-only budget the following:

$ 16,000 additional legal expenses;
$ 3,750 additional temporary office help;
$ 10,950 additional administration expenses;
$126,400 additional program expenses.

The new programs were to be:

Subscriptions	$ 600
Grievance support services	26,800
Newsletters and printing	2,500
Released time for AAUP President	8,000
Computer services	2,500
Travel and meetings	2,500
Special programs	1,000
Health and occupational safety study	3,000
Contingency fund	7,000
National services (*i.e.*, payment to National AAUP)	72,500[3]
Total . . .	$126,400

The Council adopted the proposed supplemental budget with certain modifications. At the same meeting the Council voted to set the dues for members of Rutgers

[3] I am not able to ascertain from the record whether this payment of $72,500 to National AAUP is in addition to the $45,000 payment representing National AAUP dues shown in the May, 1980 membership-only budget.

AAUP at 4% of base salary and non-member representation fees at 85% of member dues (3.4% of non-members' base salary). The dues were computed after the budget was struck. In the words of the Executive Director: "The dues figure was arrived at only after a computer analysis of all existing salaries in the unit as of spring 1980[4] and the total salary for the unit, which was later increased by seven percent to reflect July 1, 1980 raises as a result of the negotiated contract. Generally, the Council had attempted to arrive at the lowest fee schedule possible to fund the base—specifically, this amounts to 0.4 percent of salary for members and 85 percent times 0.4 percent (0.34 percent) for non-members."

Although the report of the budget committee lists a few expenditures under the heading "Budget for Members-only Expenditures", there does not appear to have been any serious analysis of expenses for the purpose of determining what portion constituted expenses for the benefit of members-only or what constituted expenses in aid of political or ideological causes. As to the new item of $72,000 to be paid to National AAUP, the budget committee's report contains only the explanation that: "The National Service fee is that portion of National member dues and a portion of the non-member fee that National can justify according to the requirements of the New Jersey Statute. For this budget, the amount is estimated as $25.00 per faculty person in the

[4] The affidavit submitted by AAUP's Executive Director stated that there are 3700 persons in the unit represented by AAUP (Walther Aff., ¶ 2). The report of the special budget committee stated that as of February 2, 1980 the unit consisted of 1351 members of Rutgers AAUP and 2572 non-members. The total is somewhat larger than the total given by the Executive Director, but this may be explainable by the fact that different dates were involved.

unit." This was a rather fragile base on which to structure a computation of representation fees. The fragility of the base is emphasized when one considers that before the adoption of this budget membership in Rutgers AAUP was permitted (in violation of the National's rules) even though a person did not pay dues to National AAUP. Under the new budget membership in the National organization was made compulsory and Rutgers AAUP paid in a lump sum from its total receipts its members' National AAUP dues and a portion of the representation fees. The effect of this method of payment, of course, was to increase the base on which representation fees were computed.

It is quite apparent that there was no analysis of either the Rutgers AAUP budget or the National AAUP budget along the lines recommended by counsel for Rutgers AAUP to determine the categories of expenditures referred to in the amendment to the Act. Rutgers AAUP proceeded on the assumption that whatever the amount of the expenditures of the local and National AAUP which could not be charged to non-members, they were less than 15% of total expenditures.

I have no doubt that it would be a major operation to perform the allocations required to insure compliance with the Act. It would require a knowledge of the meaning of the Act; it would require complete knowledge of the functions of each local and National employee and of the purposes of all non-employee related expenditures; it would require allocating all expenditures between the different categories contemplated by the Act. It is not surprising, therefore, that the rule-of-thumb figure of 85% of dues payments (the statutory maximum) was adopted

as the amount of the representation fee for budget purposes.

In October, 1980 the Rutgers AAUP Council was advised that Rutgers had agreed to include in the agreement provisions for a representation fee. The provisions read as follows:

VI—REPRESENTATION FEE

1. Representation Fee Deduction

   The parties agree that effective January 1, 1981 all employees in the bargaining unit who do not become members of the Rutgers Council of AAUP Chapters shall have deducted from their salaries and forwarded to the AAUP a representation fee in a manner and in an amount as provided below.

2. Representation Fee Amount

   At least thirty (30) days before the effective date of the representation fee, or any subsequent modification thereof, the AAUP shall notify the University of the representation fee sum to be deducted from non- members' salaries. Any change in the representation fee shall be made upon written notification to the University.

3. Representation Fee Deductions

   The representation fee shall be deducted from non-members' salaries in equal bi-weekly install-

ments. Representation fee deductions from the salaries of all non-member employees shall commence on or after but in no case sooner than the thirtieth (30th) day following the beginning of an employee's employment in a bargaining-unit position or the tenth (10th) day following re-entry into the bargaining-unit for employees who previously served in bargaining-unit positions and who continued in the employ of the University in a nonbargaining-unit position. For the purpose of this Article academic-year employees shall be considered to be in continuous employment.

If, during the course of the year, the non-member becomes an AAUP member, the University shall cease deducting the representation fee and commence deducting the AAUP dues after written notification by AAUP of the change in status. Conversely, if, during the course of the year, the AAUP member directs the University to cease AAUP dues deductions in a manner appropriate under the terms of the dues check-off agreement, the University shall commence deduction of the representation fee after written notification by the AAUP of the change in status. After deduction, representation fees shall be transmitted to the AAUP in the same manner and in the same time as AAUP dues.

4. Indemnification

The AAUP hereby agrees to indemnify, defend,

> and save harmless the University from any claim, suit or action, or judgments, including reasonable costs of defense which may be brought at law or in equity, or before any administrative agency with regard to or arising from the deduction from the salaries of any employee of any sum of money as a representation fee under the provisions of the Agreement.

The contract was ratified by the membership to take effect January 1, 1981.

On November 20, 1980 the Council adopted a demand and return system. The system was described in the December, 1980 Rutgers AAUP newsletter:

> DEMAND AND RETURN SYSTEM
>
> > The following procedure was adopted by the Executive Council of the Rutgers Council of AAUP Chapters on November 20, 1980 to comply with the requirements of Section 20 of Chapter 477, Laws of 1980. Please retain it for your records.
>
> Any person who makes representation fee payments in lieu of dues who objects to the expenditure of any portion of such payments in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of benefits available only to members of the Association

shall have the right to dissent from such expenditure. An objector shall file written notice of an objection by certified mail to the Representative Fee Review Committee ("Committee") care of the Executive Director of the AAUP.

Objections to expenditures made in any fiscal year must be raised by October 1st of the following year. Individuals not represented by the AAUP at the beginning of the fiscal year may raise such objections within ninety (90) days of the date such representation commences.

An objection may be renewed for each year by written notification as noted above. At least annually, the Association shall cause notice of its Demand and Return system including the dates for notice of objection to be printed in its newsletter.

The Executive Director shall promptly submit each objection received to the Committee which shall consider the objection for timeliness of submission and on the merits. The Committee shall be composed of three members of the faculty of Rutgers University chosen by the Executive Council of the Rutgers Council of AAUP Chapters. If the AAUP contests the objection, it shall respond to the objection in writing within 15 working days of its transmittal to the Committee. Upon receipt of the AAUP response, if any, the Committee shall determine if additional information is necessary to complete the record. It may, in its absolute discretion, seek additional information from the objector or the AAUP or hold a fact-finding hearing. When the Committee is satisfied that it has sufficient facts to rule, it shall close the record. The Committee shall rule on the objection within 15 working days of the

close of the record and shall notify all parties. The burden of proof shall be placed on the AAUP throughout the proceeding.

If the objector is dissatisfied with the decision of the Committee, he or she may appeal to the State Representative Fee Review Board provided for in Chapter 477, Laws of 1980.

Representation fees became payable commencing January 1, 1981. Rutgers AAUP's Executive Director established two budgets, one for what was deemed to be representation expenditures and the other for member-only expenditures. The former category of expenditures was financed entirely from income from non-members matched with 85% of the income from members' dues. The balance of the members' contributions went to members-only activities. The Executive Director is of the opinion that there were included in the representation budget only items permissible under the Act. This included "lobbying for legislation affecting terms and conditions of employment of unit members . . . [These lobbying activities] center almost exclusively on such issues as pensions, medical coverage for members and legislation affecting the scope of collective negotiations." (Walthers Aff., ¶ 17.) Whether there was a proper allocation of expenditures is, of course, a major issue between the parties to this action.

Plaintiffs are in disagreement with the representation fee system. One of them, Michael Crew, had been President of the Newark Chapter of AAUP, a member of the Rutgers AAUP Executive Council and a member of the special budget committee. He resigned in December, 1980 to protest use of the representation fee law and

requiring non-AAUP members to support lobbying and other activities which they oppose.

A number of the plaintiffs pursued the procedures for a return of portions of their representation fees which they believed were being used for improper purposes. The experiences of plaintiff Robinson are typical of the experiences of the others who sought a return of portions of their withheld fees.

Robinson received a December 1, 1980 letter from Rutgers AAUP inviting him to join and advising him that in any event he would be required to pay a representation fee of 85% of AAUP dues. On January 13, 1981 Robinson wrote to the Rutgers personnel office objecting to the withholding of the representation fee and on January 14, 1981 he wrote to the AAUP's Representation Fee Review Committee expressing similar objections and asserting his opinion that less than 5% of the AAUP budget expenditures dealt with contract negotiations.

On January 22, 1981 Rutgers AAUP's Executive Director sent Robinson a form to be submitted to the Fee Review Committee and advised that a filing making a claim with respect to the fiscal year ending June 30, 1981 would be timely until October 1, 1981. The form stated that certain categories of expenditures are subject to return, namely:

1. Payments in aid of activities of a partisan political nature.

2. Payments in aid of causes of a partisan political nature.

3. Payments in aid of activities or causes of an ideological nature only incidentally related to terms and conditions of employment.

4. Payment toward costs of benefits available only to AAUP members.

The form then asked that the applicant indicate for which categories of those expenditures he believed AAUP used his representation fees and directed the applicant to "state your reason and/or information base for the charge".

Unbeknownst to Robinson, the Fee Review Committee had just been appointed in January, 1981 and was not to meet until May 7, 1981. However, on January 27, 1981 he wrote to the Executive Director, with a copy to the Fee Review Committee, stating, in part:

> I believe you have already received my letter of January 14, 1981 to the Representative Fee Review Committee, care of the Executive Director, as directed by your *Reports*, Vol. II, No. 5. I enclose another copy. I believe that that letter is adequate under Chapter 477 to file a claim under Demand and Return.
>
> I might add that I do not agree with your claim, implicit in the form you have devised, that the return and demand system is limited to the four kinds of expenditures you note. It is even more clear that the form is also deceptive in suggesting that a non-member must give 'reasons and/or information basis for the charge.' Chapter 477 makes it clear that *the burden is at all times on*

> *majority representative.* It is for the AAUP to justify its claim that 85% of union dues are eligible for inclusion under the 'fair share fee.'

On May 7, 1981 the Fee Review Committee met to consider the various demands filed with it. It accepted Robinson's January 14, 1981 letter as a proper challenge to the representation fee and so notified him. After deciding which challenges would be accepted for filing the Committee deferred further action until it received the audit of AAUP expenditures for the fiscal year ending June 30, 1981.

The audit became available in September, 1981 and the three Fee Review Committee members reviewed it and concluded that it "clearly delineated" expenditures for members-only activities and those for all members of the unit (Hillson Aff., ¶ 13). The Committee's review could not be completed until information was received from National AAUP as to expenditures of its funds. This was not received until March, 1982, more than a year after Robinson filed his claim and more than eight months after the close of the fiscal year with respect to which his claim was filed.

It is not disclosed in the record just what data National AAUP furnished the Fee Review Committee. Whatever the data was, the Chairman of the Committee recites that "Upon review, the Committee was satisfied that no part of the representation fee forwarded to the National had gone for impermissible purposes . . . ." (Hillson Aff., ¶14).

By letters dated March 8, 1982 (but sent near the end

of the month) the Fee Review Committee advised each claimant that his claim had been rejected. These letters read as follows:

Dear Professor:

The Representation Fee Review Committee has completed its consideration of your objection to the collection and expenditures of the Representation fee you paid to the Rutgers Council of AAUP Chapters during the period of January 1981 through June 30, 1981.

The Committee finds that it must reject your claim against the 1980-81 fiscal year expenditures.

An 85% Representation fee is the legal maximum under New Jersey law. Our analysis of the audited local AAUP budget for FY 80-81 (available at the AAUP office—Building 4103 Kilmer 8:30 to 4:30 Monday thru Friday) and National expenditures (see attached letter from Stephen Finner) demonstrates that expenses (both Local and National) accruing to members *only* are less than 15% of total expenditures. Therefore there is no pro-rata refund of non-permissible expenditures due you.

If you are dissatisfied with this finding, you have the right to appeal to the State Representative Fee Review Board, as provided for in Chapter 477, laws of 1980.

Please note that you may file an objection against the collection and expenditures of the current fiscal

year (July 1, 1981 to June 30, 1982) until October 1, 1982.

_____

Committee Chair

The letter from Stephen Finner to which reference was made in the rejection letters purports to recite the percentage of the National AAUP budget which is allocated to various purposes during the applicable period:

> No expenditure for political or ideological purposes.
>
> 18% for academic freedom and tenure activities.
>
> 11% for economic status of the profession activities.
>
> 18% for collective bargaining development expenses.
>
> 16% for conference and Chapter development.
>
> 7% for governmental relations.
>
> 8% for other Committee activities (e.g., academic governance, status of women in the profession).
>
> 2% for organizing and membership recruitment.
>
> 20% for membership accounting, membership services, and association administration.

After reciting these percentage allocations Mr. Finner concluded "For your information, National dues were

$47 in calendar year 1981. Thus, expenditures for allowable purposes were in excess of representation fees received." How Mr. Finner arrived at his "thus" and reached this conclusion escapes me, but apparently he satisfied the Rutgers AAUP Fee Review Committee.

As the Fee Review Committee's rejection letters noted, the claimants had a right under the Act to appeal to the three-member Board appointed by the Governor pursuant to N.J.S.A. 34:13A-5.6. None of the AAUP claimants elected to pursue this option and instead instituted this suit. A description of the Board and its workings will be set forth in the next section of this opinion, as certain of the plaintiffs in the *Antonacci* case did seek relief in that forum.

IV. Antonacci v. New Jersey

The ten plaintiffs in this case are non-union teachers employed by one or another of the defendant boards of education—Westfield, Pascack Valley Regional, Edison Township, Ridgewood, and Township of Ocean.

In addition, plaintiffs named as defendants each local education association (of teachers) and its president and the affiliated County education association. Certain superintendents of education and presidents of boards of education were joined as defendants.

Also named as defendants were the New Jersey Education Association and its president and the National Education Association and its president.

State government defendants consisted of the State of New Jersey and its Governor and James W. Mastriani, Chairman of PERC.

As in the *Robinson* case, the *Antonacci* plaintiffs attack the constitutionality of the amendments to the Act permitting the withholding of representation fees from their salaries.

While details of the events recited by the plaintiffs in the various school districts may vary, the essential elements of what transpired in each district are the same.

The teachers in each of the school districts are represented by the local education associations. Persons who are members of the local association are automatically members of the county education association, the New Jersey Education Association (NJEA), and the National Education Association (NEA). The dues which members of the local association pay include dues to the local, county, state and national associations. The record establishes that both NEA and NJEA spend substantial sums for national and state candidates for office and for lobbying at the national and state levels.

NJEA provides very extensive organizational support services to the local associations, and the uniformity in the forms and procedures which the local associations used in implementing the representation fee provisions of the Act are attributable to the fact that they were prepared or suggested by NJEA.

After the adoption of the representation fee amendment the various school boards and the local education

associations negotiated and agreed upon representation fee provisions. These provisions required the withholding from salaries of non-association members and payment to the association of a sum equal to 85% of members' dues, initiation fees and assessments.

Upon negotiation of such a provision the local association sent letters to non-members inviting them to join the association and explaining that failure to join would result in imposition of the representation fee. The letters of the various local associations were of the same tenor. The one to plaintiff Meveril Jones read, in part:

> The climate in which we work today is not the best. Attacks on the public schools by the press, by politicians, and by school board associations require us to maintain a maximum effort to protect your rights and to advance your interests. We must spend ever increasing amounts of money to provide proper legal defense for members, to bargain effectively, to process grievances, to lobby for the protection of tenure, pensions, sick leave, and other benefits. In these crucial times we need your support.
>
> Under the terms of Public Law 1979, Chapter 477, the Westfield Education Association has negotiated a fair share representation fee to be deducted from the paychecks of all bargaining unit members who do not join the Association by October 15. This representation fee amounts to 85% of our dues or $179.35 to be collected in monthly installments over the life of our contract with the Board of Education.

The dues on the basis of which the Westfield representation fee was computed amounted to $211 and were distributed as follows: $45 to NEA, $117 to NJEA, $12 to

Union County Education Association, and $37 to Westfield Education Association.

Non-member teachers in the various school districts objected to the withholding of representation fees, communicating their objections both to the boards of education or superintendents and to the local associations. The grounds for the objections included unwillingness to make payments to state and national organizations espousing social and political causes with which the non-member disagreed and opposition to compulsory unionization as a matter of principle.

The various plaintiffs sought to utilize the demand and return systems established in their districts to challenge the 85% fees. Typical of the experiences of each of the plaintiffs are the experiences of John Russell and plaintiffs Richard H. Trexler, A. William Onder, Leon Matelski and Edward Jakubco, who joined with him to seek a refund of payments withheld and paid to the Edison Township Education Association.

In December, 1980 the Board of Education had agreed that by December 31st the Association would determine which teachers were to be assessed the representation fee, the Association would establish a demand and return system "through which non-members can challenge the amount of the representation fee" and the 1980-81 Agreement would contain a provision obligating the Teacher Association to indemnify and hold the board harmless for liability and costs of suit arising out of actions taken in conformity with the representation fee provisions.

By a letter dated December 30, 1980 Russell and the other non-members were invited to join the Association and were informed that the 85% fee would be deducted from the salaries of non-members. On February 25, 1981 Russell wrote to the President of the Edison Township Education Association. He protested the amount of the representation fee, particularly that part going to the county, state and national associations. He asked for copies of the 1980-81 budgets for the local, county, state and national teacher associations.

On April 8, 1981 the President of the Edison Township Education Association responded. She expressed disagreement with Russell's contention that portions of his representation fee could not be paid to the county, state and national associations. She informed him that at the end of the 1980-81 fiscal year he would be able to challenge the absence of a final rebate or the size of a rebate under the Association's demand and return system. He was informed that at that time "you will be provided with the appropriate information, including any budgets that may be relevant". His letter was treated as a request for a rebate and he was told it would be processed accordingly.

At some time prior to April, 1981, when Russell received the reply to his letter, the Edison Township Education Association had adopted a Demand and Return System (the System) prepared by NJEA for use by all local associations. The same System appears to have been adopted in the other school districts which are defendants in this case. It must be described in some detail.

The System defined the "fiscal year" as September 1 through the following August 31. It defined "member only benefits" as "benefits financed through the regular membership dues, fees and assessments available to or benefiting only members of the Association, but does *not* mean governance meetings which may be attended only by members and other member only activities and functions which are necessary for the operation and institutional maintenance of the Association *or the associations with which it is affiliated*". (Emphasis added.) Thus, no portion of the governance or institutional expenses were to be apportioned to political or lobbying activities in which any of the four levels of associations engaged. Evidently all such expenses were to be included in representation fees and to be treated as if they were incurred only for contract negotiation and administration and grievance proceedings from which non-members benefited.

"Political activity" was also defined, and there was excluded (in line with the Act) "lobbying activities designated to foster policy goals in collective negotiations and contract administration or to secure for the employees represented by the Association advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations with the boards of education".

The System required that not more than 30 days after the beginning of each fiscal year in which a representation fee is in effect, the Association determine from the budgets of the four levels of associations the "preliminary rebate". The preliminary rebate was the amount by which expenditures for political activities and member only benefits exceeded the difference between member-

ship dues and representation fees.

The System required that not more than 30 days after the end of each fiscal year the Association determine the "final rebate", making the same computation but using actual expenditures rather than budget allocations.

The System created a four-member Regional Review Panel consisting of representatives designated (one each) by the Edison Teachers Association, the Middlesex County Teachers Association, NJEA and NEA.

Section II of the System provided that not more than 60 days after the representation fee agreement becomes effective in any fiscal year the Association shall post a notice stating whether there is a preliminary rebate and the steps to be taken by a non-member to request it.

Section III states that a non-member may request a rebate by filing a statement with specified information not more than 30 days after he first paid any portion of the representation fee or knew or reasonably should have known of his right to request a rebate. Section IV provides that upon receipt of the request the Association will place any preliminary rebate attributable to the claimant in escrow and advise the claimant that the final rebate to which he is entitled will be sent to him after the end of the fiscal year.

Section V of the System specifies that not more than 30 days after the end of the fiscal year the Association shall send to each non-member who requested a rebate a communication indicating whether there is a final rebate and the steps to be taken to challenge the absence or

amount of a final rebate.

Section VI governs challenges to final rebates or to the absence of a rebate. A non-member must mail his challenge not more than 10 days after he received the notice of final rebate provided for in Section V. The Association must attempt to dispose of the challenge informally, but if that is not successful the claimant may refer the challenge to the Regional Review Panel. He must mail this challenge no later than 10 days after he sent his original challenge to the Association. The System provides, in accordance with the statute, that "the burden of demonstrating that no part of the unrebated representation fee was used for political activity or member only benefits shall be upon the Association". The Panel is required to render its decision not more than 30 days after the non-member sent his challenge to it. A non-member who is not satisfied with the decision of the Panel may appeal to the three-member board established under the Act.

Returning to Russell's challenge to the representation fee paid to the Edison Township Education Association, the April 8, 1981 letter which he received from the Association's President advised him, as noted above, that his February 25, 1981 letter would be treated as a request for rebate. The request was treated as being made under Section III of the System, that is to say, a challenge to the amount of the preliminary rebate. The next communication he received was a September 28, 1981 letter from the Association advising him as follows:

> The Edison Township Education Association having computed its actual expenditures for the 1980-81

> fiscal year, finds that it has expended $2.25 (of a total of $10.99 expended by all levels of the Unified Profession, including ETEA, MCEA, NJEA and NEA) per member for member-only benefits and partisan political and ideological activities. This amount is not in excess of the percentage allowable by law and is, therefore, not subject to a rebate.
>
> Should you wish to challenge this decision, the attached instructions will provide you with the proper procedures.

The September 28th letter was in compliance with Section V of the System, *i.e.*, notification of final rebate. On October 5, 1981 Russell wrote the Association challenging the absence of a final rebate for the 1980-81 school year. He again asked for copies of the final budgets for that year of the four education associations to which his representation fee was paid. He asked for an explanation of the line items.[5] Under Section VI of the System the Association was required to communicate with Russell to seek to dispose of the challenge informally. That was not done and, consequently, on October 15, 1981, the last day permitted under the System, Russell notified the Association that he wished to

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[5] The experience of the non-union plaintiffs in a case similar to this one instituted in Michigan, *Lehnert v. Ferris Faculty Association*, No. G78-346 CA 1 (W.D. Mich., filed May 22, 1978), raises a doubt whether NEA financial figures will ever be made available to Russell however often he asks for them. In that case NEA withdrew its claim against the non-union teachers for its share of the agency shop fees in controversy, citing the extreme burdensomeness of complying with financial discovery requests. If assembling such data imposes an intolerable burden on a wealthy and powerful national union, it requires little imagination to picture the burden imposed upon individual teachers seeking to determine if the fees withheld from their salaries have been properly computed.

refer the challenge to the Regional Review Panel. He again asked for copies of the applicable budgets and an explanation of the line items.

On October 27, 1981 the President of the Edison Township Education Association advised Russell that she had forwarded his letter "to the appropriate office". On November 5th she advised Russell that the Regional Review Panel would hear his claim at 7:00 p.m. on November 17, 1981 (a date after the expiration of the 30 days within which the Review Panel was required to render its decision). The hearing was held as scheduled.

By letter dated November 18, 1981 the Review Panel advised Russell that it had rejected his challenge and the challenges of Jakubco, Matelski, Onder and Trexler, stating, in part:

> Pertinent budget material and testimony was presented by the following people for the respective organizations:
>
> 1. Aurora Bernard-Salit for the Edison Township Education Association
> 2. Maria Versocki for the Middlesex County Education Association
> 3. Cary Pitman for the New Jersey Education Association and National Education Association
>
> The challengers argued that:
>
> 1. The composition of the panel was unfair.
> 2. The demand and return system was unlawful.

> Following the hearing the Regional Review Panel gave full consideration to all of the documents, testimony and arguments presented to it and determined that the total dues required to be paid by each member of Edison Township Education Association for 1980-81 was $248.00 and the per capita cost for member only benefits and partisan political and ideological activities was $11.02 which is less than 15% of the total dues. The panel then concluded that no part of the representation fee required to be paid by non-members was used for member only benefits or partisan political or ideological activities. Therefore, there is no final rebate due of any portion of that representation fee.
>
> Should you not be satisfied with the above decision of the Regional Review Panel, you may appeal to the Board established pursuant to the statute (34:13A-5.6).

It would have been a tour de force if, in one evening, the Regional Review Panel could have made the extraordinarily difficult financial analysis of the 1980-81 expenditures of the four education associations required to determine what portions should be attributable to political and member-only purposes. It heard the testimony of the three persons referred to in the decision letter quoted above, none of whom appear to have had any particular accounting expertise. Six very brief documents accompany the decision letter in the record and it seems likely that, with the exception of the first, they were submitted to the Review Panel: (1) The first document was a form evidently prepared by NJEA, designed to specify the dues payable to each of the four levels of education associations and the per capita portion of each

portion of dues spent for member-only benefits and political activities. (2) The second document appears to be the 1980-81 expenditures of the Edison Township Education Association, totalling $87,140.34. (3) The third document sets forth the income and expenditures of the Middlesex County Education Association for the period May 1 to June 30, 1980, with the 1979-80 budget figures set forth. (4) The fourth document consists of handwritten notes and figures, the significance of which is not immediately apparent. (5) The fifth document is entitled "New Jersey Education Association Computation of 'Member Only Services' and 'Political Activity of Partisan Nature' for Period 9/1/80 to 8/31/81". It shows total expenditures of $12,227,000 by operating categories and shows six items totalling $267,771 as the net cost of member-only services, *i.e.*, 2.19% of total expenditures. Thus, it is stated, of the $117 dues payment, only $2.56 is attributable to member-only benefits. The document further states that "All expenditures for partisan political activity which are incurred have been reimbursed by the NJEA PAC. A total of $1,406 was reimbursed for the period covered." The document does not appear to disclose what was spent for lobbying either of the kind for which, under the Act, a representation fee may be charged or of the kind for which, under the Act, a representation fee may not be charged. (6) The final document is the NEA's "Political Activity Rebate Preliminary Estimate 1980-81". Its full significance cannot be understood from the face of the document, but it states that the amount expended for political activity was $3,561,922 out of total expenditures of $37,059,124, constituting 9.61% of the total. Various adjustments were made which resulted in a computation that political activity accounted for 10.28% of total expenditures, resulting in

$4.63 of each member's dues of $45 going toward political activities. It cannot be ascertained from the document whether any lobbying expenses were included in political activities expenditures, and, if so, what kind of lobbying activities. It does not appear that any member-only expenses were taken into account. An affidavit filed in this case by Mitchell E. Roth, Esquire, a staff attorney in the Office of General Counsel of NEA, describes the procedures NEA follows to compute political activity rebates.

It is evident that if it is to be determined whether New Jersey's representation fee statute has been followed it would be necessary to ascertain the assumptions which were used in determining what items should be included in membership-only and political activity expenses, and it would be necessary for accountants to analyze the books and records of each of the four constituent education associations to determine if the computations had been properly made.

Having been unsuccessful before the Regional Review Panel, Russell and his fellow claimants tried to appeal to the statutory Appeals Board. They had considerable difficulty obtaining information as to the whereabouts of this Board. Nevertheless, on December 7, 1981, they addressed a letter to it in care of PERC, notifying it of their wish to appeal. On February 11, 1982 they received a letter from defendant James W. Mastriani, Chairman of PERC, advising that the Appeals Board had not been fully constituted nor had administrative rules been adopted to carry out its responsibilities under the Act. PERC did take one definitive action—it assigned the case a docket number.

No further action having been taken by the Appeals Board, Russell and the other plaintiffs filed their complaint in this Court on April 13, 1982.

There was considerable delay in establishing the Board of Appeals which, under N.J.S.A. 34:13A-5.6, was to consist of three members appointed by the Governor with the advice and consent of the Senate. Although the Act became effective July 1, 1980, it was not until December, 1981 that the Governor appointed the third member. The person named as Chairman resigned in February, 1982.[6]

However, by May 24, 1982 (after the instant cases had been filed in this Court), the Board had concluded that it would not hear the appeals itself and should refer them to the Office of Administrative Law, pursuant to New Jersey's Administrative Procedure Act. N.J.S.A. 52:14B-1, *et seq.* On that date the Board referred two appeals to the Office of Administrative Law for *de novo* hearing —the appeal filed by Russell, Jakubco, Matelski, Trexler and Onder, and an appeal filed by another plaintiff in this case, Thomas Gay. The persons who appealed to the Board must now anticipate lengthy proceedings of a judicial nature. *See Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008 (3d Cir. 1981). There will be

[6] Plaintiffs in a state court proceeding (not the plaintiffs in this case) sought to restrain collection of representation fees on the ground that the Board of Appeals had not been appointed as mandated by the statute. The trial court denied the requested relief holding that a Board of Appeals had been duly constituted and could act even though one of its three members had resigned. *Olsen v. State of New Jersey*, Docket No. C-4286-81E (Super. Ct., Chan. Div. July 12, 1982). A notice of appeal has been filed.

a full evidentiary hearing before an administrative law judge, who will report his findings and recommendations to the Board of Appeals. The Board will then render a final decision. From that decision, the claimants (or the education associations) will have the right to appeal to the Appellate Division of the Superior Court of New Jersey, N.J. Ct. Rule 2.2-3(a), with the possibility of further review by the New Jersey Supreme Court. N.J. Ct. Rules 2:2-1, 2:12—all this to contest the amount of claimants' 1980-81 representation fee. Of course, if any claimant believes the defect in computing the fee extends to the 1981-82 fee, or the 1982-83 fee, the tortuous route beginning with an objection to the preliminary rebate pursuant to Section III of the local education association's Demand and Return System must be resumed for each year.

Conclusions of Law

The Court has jurisdiction over these actions by virtue of 28 U.S.C. § 1343 to provide remedies for causes of action arising under 42 U.S.C. § 1983.

Plaintiffs seek preliminary injunctive relief. This is an equitable remedy and to prevail plaintiffs must show: (i) a reasonable probability of ultimate success on the merits of the litigation, (ii) irreparable harm to the plaintiffs if the injunction is not granted, (iii) the absence of countervailing harm to other interested persons if the injunction is granted, and (iv) the absence of countervailing public interests should the injunction be granted. *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1981).

A. The Merits

I turn first to the question whether plaintiffs have shown that they have a reasonable probability of success on the merits.

Two questions of constitutional law must be addressed. First, does the provision of N.J.S.A. 34:13A-5.5c permitting labor organizations to use the representation fees of public employees for lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer violate the First Amendment rights of non-member employees. Second, do the statutory provisions providing for a demand and return system for the recovery of impermissible expenditures of representation fees overcome the substantive and procedural due process challenges to the New Jersey representation fee plan.

The resolution of these questions must start with the state of the law as developed in a trilogy of United States Supreme Court cases—*Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956); *International Assoc. of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The Court recognized an important governmental interest which is advanced by agency shop provisions.

> The confusion and conflict that could arise if rival

> teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. . . . The desirability of labor peace is no less important in the public sector, nor is the risk of "free riders" any smaller.

Abood at 224.

The existence of the important government interests advanced by the agency shop arrangement supports the impingement upon associational freedom which an agency shop entails. In *Abood* the Court dealt with a challenge to a collective bargaining agreement provision which required every teacher who had not become a union member within 60 days of hire (or within 60 days of the effective date of the provision) to pay the union a service charge equal to the regular dues required of union members. The Court observed that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration and grievance adjustment, [the *Hanson* and *Street* decisions] appear to require validation of the agency shop agreement before us", *id.* pp. 225, 226.

Under the principles of *Hanson, Street* and *Abood*, New Jersey has the unquestioned power to enact legislation permitting collective bargaining agreements to require that public employees in a bargaining unit who are not members of the bargaining representative pay a service fee for the benefits they receive from the bargaining representative.

In *Abood*, however, the Court was confronted with a statute which sanctioned the use of non-union-member fees for purposes other than collective bargaining, including legislative lobbying and support of political candidates. Plaintiffs in that case argued that such use of service fees paid by them was a violation of their constitutional rights. The Court agreed:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State . . .
>
> These principles prohibit a State from compelling any individual to affirm his belief in God . . . or to associate with a political party . . . as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public teacher.
>
> We do not hold that a union cannot constitutionally spend funds for the expression of political views, in behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not

> object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment.

Id. at 234-236.

In a footnote, the Court dealt with the contention that non-members could not be required to pay for social activities not open to non-members, stating, "It is unclear to what extent such activities fall outside the Union's duties as exclusive representative or involve constitutionally protected rights of association. Without greater specificity in the description of such activities and the benefit of adversary argument, we leave those questions in the first instance to the Michigan courts." *Id.*, n.33 p. 236. That question, of course, is not implicated in this case because the New Jersey statute excludes from the representation fee the cost of benefits available to or benefitting only its members. N.J.S.A. 34:13A-5.5.

However, New Jersey's statute does require that I address the "difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited". While permitting a non-member to demand the return of any part of a fee paid by him which was used either in aid of activities or causes of a partisan political nature only incidentally related to the terms and conditions of employment or for member-only benefits, the statute specifically excludes from the refund "the costs of support of lobbying activities designed to foster policy

goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations with the employer".

Defendants argue that non-members should pay for this kind of lobbying, since it is designed to secure for them, as well as for members, increased benefits and improved conditions of employment. Plaintiffs argue that this kind of lobbying extends far beyond what *Abood* held to be permissible and permits their representation fees to be used for ideological and political purposes.

The *Abood* opinion, while not deciding, suggests how the line between permissible and impermissible lobbying expenditures from representation fees should be drawn. Repeatedly the Court stated that it is permissible to require non-members to contribute to the cost of collective bargaining activities. The example of permissible use of non-member representation fees for lobbying purposes involved a direct relationship to on-going collective bargaining: "The process of establishing a written collective bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; *related* budgetary and appropriation decisions might be seen as an integral part of the bargaining process." *Id.* at 236. Thus, this example contemplated a situation in which negotiations have led to agreement, but implementation requires legislative or administrative action by a public body. Expenses

incurred to secure such action, it would appear, may properly be made from representation fees.

The New Jersey statute permits much more extensive use of representation fees for lobbying purposes—"lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment *in addition to those secured through collective negotiations with the public employer*". N.J.S.A. 34:13A-5.5c (emphasis added). This, I conclude, goes beyond the permissible limits and has the effect of compelling nonmembers to support ideological causes with which they disagree.

The example which defendants themselves have advanced illustrates the point. There are a number of subjects which, under New Jersey law, are not the subject of negotiation in the collective bargaining process. For instance, a majority representative of public employees cannot negotiate contractual clauses prohibiting the loss of jobs through reduction in force or subcontracting. *In re Local 195, IFPTE v. State of New Jersey*, 88 N.J. 393 (1982); *In re Maywood Board of Education*, 168 N.J. Super. 45 (App. Div. 1979), *certif. den.*, 81 N.J. 292 (1979); *Union Cty. Bd. of Ed. v. Union Cty. Teach. Assn.*, 145 N.J. Super. 435 (App. Div. 1976), *certif. den.*, 74 N.J. 248 (1977). Other terms and conditions of employment—such as pension plans or seniority as it relates to layoff, recall, "bumping" and reemployment of Civil Service employees—are set by statute or regulation which preempt collective negotiations. *State v. State Supervisory Employees Association*, 78 N.J. 54 (1978).

Defendants contend that they may constitutionally use non-member representation fees to lobby to change these statutes.

There are very deep political and ideological differences of opinion as to the merits of these statutes. On the one hand there are those who believe that these subjects which are not now the subject of collective bargaining should be left completely in the hands of school boards and legislators who are elected by and responsible to the voters.* These bodies should exercise their judgment in these areas, so the argument goes, without being subjected to the pressures brought to bear by employee organizations. The contrary view, espoused most strongly by employee organizations such as those which are defendants in this case, is that these subjects should be opened up to the bargaining process or dealt with directly by legislation.

Although plaintiffs are teachers and defendants can argue that they might benefit personally from changes in these laws, plaintiffs and other non-members of the employee organizations may nevertheless oppose such legislative changes. They may oppose for political or ideological reasons; they may believe, as do many other citizens, that the legislative changes sought by the employee organizations are bad public policy even though they, as teachers, might receive certain benefits.

I do not believe *Abood* permits a state to compel a

* Some school boards are appointed by elected officials rather than being elected directly, but the argument as to responsibility to the voters to make decisions in critical areas uninfluenced by the pressures of labor negotiations remains the same.

non-member to support lobbying of this nature through use of her representation fee. New Jersey's statute does permit such lobbying, and to that extent it violates plaintiffs' First Amendment rights.

The next question going to the merits which must be addressed is whether, even assuming the validity of the statute's lobbying provisions, the demand and return system adequately protects plaintiffs' First Amendment rights.

As described above, the New Jersey statute specifies that the representation fee "shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefitting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments". N.J.S.A. 34:13A-5.5b. The representation fee, therefore, may be spent for political, ideological and lobbying activities, but the statute gives a payor of the fee a right to demand and receive back his pro rata share of expenditures for political and ideological purposes and, as described above, for some lobbying purposes. This system purports to find support in *Abood*.

An examination of *Abood*, however, suggests that such support is tenuous at best. There the Court addressed the question of an appropriate remedy if the plaintiffs proved their allegations that their payments to the union had been used for political or ideological purposes. It noted with approval the remedies suggested in *Street* and in *Railway Clerks v. Allen*, 373 U.S. 113

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(1963), namely, an injunction against expenditures for political causes of the moneys paid by objecting non-member employees and restitution of an appropriate fraction of the sums paid representing expenditures for political purposes.

In *Abood*, after the commencement of litigation, the union had adopted a plan whereby a dissenting employee who filed a protest against political expenditures was entitled to a pro rata refund of his service charge in accordance with the calculation of the portion of total union expenses for the specified purposes. The calculation was made by the union in the first instance, but was subject to review by an impartial board. In view of that development the Supreme Court, upon remanding the case, suggested that "[i]n view of the newly adopted Union internal remedy, it may be appropriate under Michigan law, even if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute". *Id.* at 242. In a footnote the Court stated, "We express no view as to the constitutional sufficiency of the internal remedy described by the appellees. If the appellants initially resort to that remedy and ultimately conclude that it is constitutionally deficient in some respect, they would of course be entitled to judicial consideration of the adequacy of the remedy." *Id.*, n.45, p. 208. This is hardly an endorsement of the constitutionality of a demand and return system.

Justice Stevens' concurring opinion confirms that *Abood* left open the question of the constitutionality of any demand and return system:

> By joining the opinion of the Court, including its

> discussion of possible remedies, I do not imply—nor do I understand the Court to imply—that the remedies described in *Machinists v. Street*, 367 U.S. 740, and *Railway Clerks v. Allen*, 373 U.S. 113, would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining. Any final decision on the appropriate remedy must await the full development of the facts at trial.

Id. at 244.

In a recent decision the Court of Appeals for the Ninth Circuit relied upon *Abood* for the proposition that "The rebate remedy formulated to avoid statutory violations was thus approved to protect against constitutional violations as well." *Ellis v. Brotherhood of Railway and Airline and Steamship Clerks*, ____ F.2d ____, ____ (9th Cir. 1982) (Docket Nos. 80-5562, 5603). Relying upon that proposition the Court sustained the district court's finding that the union's rebate plan protected from constitutional attack the Brotherhood's union shop agreement and the resulting use of dues of dissenting members for political and ideological purposes. In light of footnote 45 in *Abood*'s majority opinion and in light of Justice Stevens' comments in his concurring opinion, it appears to me that the major premise for the Ninth Circuit's conclusion is flawed.

I set forth in some detail in the findings of fact in this

case the efforts which various of the plaintiffs expended in an attempt to pursue the demand and return system contemplated by the New Jersey statute. Were it not apparent from the face of the statute, it certainly becomes apparent when one reviews these facts that the demand and return system created by N.J.S.A. 34:13A-5.6 imposes heavy burdens on a non-member who pays a representation fee to a multi-tiered union. Even though the burden of proof is on the union, that initial burden can be readily met, as it was in the case of the AAUP and education association proceedings in this case. In each case very simple and conclusory statements as to expenditures were submitted by each union tier—two tiers in the case of AAUP, four tiers in the case of the education associations. Confronted with such a showing, the non-members must then go behind those statements to test not only the propriety of the accounting involved but also the assumptions which were made in allocating expenses to member-only benefits, partisan political activities, and varying kinds of lobbying activities. This the non-members must do before the internal union bodies and then before an administrative law judge. They must proceed before the Appeal Board after the administrative law judge makes his findings and recommendations and they are confronted with an appeal to the Appellate Division of the Superior Court of New Jersey and possibly to the New Jersey Supreme Court.

This system does not prevent "compulsory subsidization of ideological activity by employees who object thereto", *Abood*, at 237. Unless a public interest law firm represents the non-members as in the present cases, a non-member could not be expected to expend the time and money required to recover that portion of his repre-

sentation fee used for political or ideological purposes. *See Railway Clerks v. Allen, supra*, at 118.

The defendants urge that limiting the representation fee to 85% of a member's dues and assessments is a practical guarantee that a non-member's fees will not be used for improper purposes. There might be some merit in this contention if only expenses of the local bargaining representative were involved and if, in advance of the collection of the representation fee, there was available a detailed budget showing receipts and expenditures of the local organization. That is not the case here, however. In the AAUP situation there is a tri-partite local association covering the Camden, New Brunswick and Newark campuses and over it there is a very large national organization with headquarters in Washington, D.C. In the education association situation there are relatively modest local and county associations functioning under the umbrella of large and powerful state and national organizations. To assume that membership-only expenses and political, ideological and lobbying expenses of each of those organizations total 15% or less of pertinent total expenses requires an exercise of faith which should not be required of plaintiffs.

The fault inherent in the New Jersey statutory system is that it shifts the burden to the wrong party and in so doing, as a practical matter, it either permits non-consensual expenditures for political and ideological purposes or else it creates a situation where it cannot be ascertained without intolerable efforts whether such expenditures have been made.

I do not believe anything in *Abood* permits this result.

One highly respected state court has so held. *School Committee of Greenfield v. Greenfield Education Association*, Docket No. SJC-2442 (Sup.Jud.Ct. Mass. Jan. 14, 1982).

In *Greenfield* the Court dealt with a rebate procedure established under a statutorily authorized collective bargaining agreement which required teachers who were not Association members to pay an agency service fee to the Association commensurate with the cost of collective bargaining and contract administration as determined by the Association. The service fee for the year in question was $153; dues in that year were $158. There was no dispute that a portion of the $153 was used for social, political and speech activities of the Association. The School Committee instituted suit against the Education Association and two teachers who refused to pay the service fee, seeking a declaratory judgment as to whether it could dismiss the teachers without violating the statutory and constitutional rights of the teachers.

The Massachusetts statute authorizing the payment of a service fee as a condition of employment required that the employee organization receiving the fee establish "a procedure by which any employee so demanding may obtain a rebate" of the portion of the fee which involves expenditures by the "organization or its affiliates" of moneys for political, social, or charitable purposes. Mass. General Laws c. 150E, § 12, as amended by St. 1977, c. 903. The Association urged that the rebate procedure met the requirements of *Abood*. The teachers argued that the rebate procedure infringed on their rights in two ways: "first, it would deny them due process of law if the initial decision on fee allowability is made by

the association, which has an obvious stake in the controversy; and second, it would violate their First Amendment rights if they must first pay the entire amount to the association, allowing it to use the funds in the interim for social, political, and speech activities, and depriving them of the use of the funds for their own expressive activities". *Id.*, Slip Op. 11, 12.

The Court described the rebate procedures available to the teachers in that case. The procedures were similar to the procedures required by the education associations in the present case, although in *Greenfield* there were three instead of four tiers of education associations. The Court concluded that "[t]he procedures appear not only cumbersome but designed to discourage all but the most zealous employee". *Id.*, Slip Op. 11, n.4. The Massachusetts statute did not create an Appeal Board to which an employee could appeal an adverse determination of the Association. Such an appeal introduces impartiality into the proceedings and adds to their cumbersomeness.

In *Greenfield* the Court held that:

> Mandating resort to the rebate procedure here would produce a further constitutional difficulty because of the requirement that the entire fee be paid to the association pending proof of legitimacy. This interim payment, as the teachers contend, not only deprives them of the opportunity to engage in expressive activities with those funds but also forces them to subsidize the objectionable activities of the organization. Justice Stevens wrote a concurring opinion in *Abood* primarily to warn against any implication that employees could be forced to subsidize, even temporarily, activities they found objec-

> tionable. *Abood, supra* at 244. We agree: the teachers should not be required to suffer an interim *constitutional* deprivation, while the association is deprived only of funds to which it is entitled by statute and agreement.
>
> We find unpersuasive those cases which uphold a requirement that the fee be paid to the organization pending a determination, judicial or otherwise, of the permissible amount. See *White Cloud Educ. Ass'n v. White Cloud Bd. of Educ.*, 101 Mich. App. 309 (1980); *Browne v. Milwaukee Bd. of School Directors*, 83 Wis.2d 316, 335-340 (1978).

Id., Slip Op. 17, 18.

The Court further held that as a matter of statutory interpretation the Massachusetts statute gave the dissenting employee the option of using the rebate procedure or bringing a complaint before the Labor Relations Commission:

> We conclude that § 12 does not require dissenting employees to pay the disputed fee to the association, pending adjudication. . . . The [Labor Relations] Commission may require the employee to pay the disputed fee into an escrow account, but may not require that it be paid to the organization until the Commission has determined the permissible fee. Once the employee has brought a complaint, the burden of justifying the fee as permissible must rest on the organization.

Id., Slip Op. 19.

The facts in the *Greenfield* case differ from the case at

hand in two important respects. First, in Massachusetts there was no provision for the employer to withhold from the teacher's salary the representation or service fee as there is in New Jersey. Thus the New Jersey teacher does not have the option available to the Massachusetts teacher of preventing use of his money for impermissible purposes by not paying the fee. Second, under the New Jersey statute there does not appear to be any alternative to the cumbersome statutory rebate procedure. These differences make it even more difficult to square the New Jersey statute with the United States Constitution.

I am of the opinion that *Greenfield* was a reasoned and correct application of *Abood* to a situation having significant similarities to the present case. Applying *Abood* and the same reasoning to the present case requires a holding that N.J.S.A. 34:13A-5.5 and 5.6 violate plaintiffs' constitutional rights in that (i) these statutory provisions permit labor organizations to receive and use plaintiffs' representation fees for political, ideological and impermissible lobbying purposes over plaintiffs' objections, and (ii) the demand and return system purportedly designed to enable plaintiffs to recover the portion of their representation fees used for political, ideological and impermissible lobbying purposes does not avoid or cure the improper use of representation fees because it is extraordinarily cumbersome and places heavy burdens upon a claimant.

In *Opinion of the Justices*, 401 A.2d 135 (Sup. Jud. Ct. Me. 1979), the Court rendered an advisory opinion that an agency fee of 80% of union dues would be valid absent a prior evidentiary hearing, although the fact that such a fee was fixed by a collective bargaining agreement

would not make the amount conclusive upon a non-member who puts the amount in issue in an appropriate judicial proceeding. I am not at all sure that, faced with the facts of the present case and not an abstract question, the Justices of the Supreme Judicial Court of Maine would uphold the validity of the representation fee set without prior evidentiary hearing in this case.

The demand and return system in the present case differs significantly from the refund system which was upheld in *Ky. Educators, Etc. v. Ky. Registry, Etc.*, 677 F.2d 1125 (6th Cir. 1982). There a teacher not only had the right to claim a refund of dues and political contributions deducted from his salary; he had the right to prevent deductions for political purposes by notifying the school district. The demand and return system in the present case more closely resembles the plan which was disapproved in *Federal Election Commission v. National Education Association*, 457 F. Supp. 1102 (D.D.C. 1978). There the check-off system for political funds was held to violate the Federal Election Campaign Act of 1971 because it required any member who did not wish to contribute to submit a separate written request for refund and did not enable such member to prevent the deduction. The Court held that the system placed an undue burden on the dissenter—a very mild burden in comparison with the dissenter's burden in the present case. *Cf. Arrow v. Dow*, 51 U.S.L.W. 2065 (D.N.M. 1982) (use of dues of integrated bar for lobbying purposes).

The recent opinion of the Court of Appeals for the Third Circuit in *Galda v. Bloustein*, Docket No. 81-2433 (Aug. 4, 1982), is instructive. The plaintiffs in *Galda*,

Rutgers students, filed suit alleging that their First and Fourteenth Amendment rights had been violated by the University's requirement that they pay a refundable fee to support the New Jersey Public Interest Research Group (PIRG), an organization which engaged in political and ideological activities with which plaintiffs disagreed. The district court granted summary judgment upholding the PIRG funding arrangement because it contained a refunding mechanism. *Galda v. Bloustein*, 516 F. Supp. 1142 (D.N.J. 1981). The refunding arrangement was the ultimate in simplicity. All a student was required to do was to submit a "Refund Request" form to PIRG. PIRG then ascertained that the claimant was a Rutgers student and had paid the fee. It issued a check directly to the student. The entire process from request to refund took only several months.

The Court of Appeals reversed, holding that if, in fact, the exaction of the fee was unconstitutional the refund provision would not be adequate to cure the defect. The case was remanded to the district court for a ruling on the constitutionality of the mandatory fee. That, in turn, hinged upon the controverted issue whether there was a compelling state interest justifying this impingement upon plaintiffs' constitutional rights.

The Court referred to the *Abood* case and noted that "[w]e need not decide today whether, in a situation identical to that in *Abood*, a refund mechanism would be sufficient to cure an otherwise unconstitutional fee assessment". Slip Op. at 20. However, observations of the Court suggest that it would not approve the refund system established in N.J.S.A. 34:13A-5.6.

The Court pointed out that in *Abood* the Supreme Court found that there was a compelling state interest in labor peace, fostered by the collective bargaining process, and that this interest "was deemed sufficiently compelling to justify some intrusion on the employees' rights to associate". Slip Op. at 11. This justified compulsory fees to pay for collective bargaining, contract administration and grievance adjustment. The Court went on to observe that "[e]xtraneous activity in the political sphere, however, could not be so justified; thus, any political expenditures 'not germane to [the union's] duties as collective bargaining representative' could not be financed from fees paid by those who affirmatively objected to the union's ideological viewpoint. 431 U.S. at 235" Slip Op. at 11.

The present case differs from *Galda* in at least one significant respect. In *Galda* it was conceded that the student fee at issue was used for political and ideological purposes. In the present case, at least some portion of the fees paid by plaintiffs are used for lawful purposes—to pay the non-members' share of collective bargaining, contract administration and grievance expenditures. Each union tier makes member-only expenditures and each makes political, ideological and lobbying expenditures. Plaintiffs are asked to accept on little more than faith that these expenditures at each tier do not exceed 15% of total expenditures and that, therefore, no portion of the representation fee (which is limited to 85% of union dues and assessments) is used by any level of the unions for impermissible purposes. The unions are not required to make any advance showing that the fees are in an amount required for permissible purposes, and the reality of the situation is such that non-members do not

have a viable procedure to determine after the fact whether their fees were used only for permissible purposes. This, I think, creates an insupportable situation.

To take a non-member's involuntary fee under circumstances where the non-member does not know in advance of payment and is unable to ascertain after payment whether the fee is used for political and ideological purposes which he opposes cannot be squared with the First Amendment.

As described above, the demand and return system created by the New Jersey statute places such heavy burdens on the objecting non-member and takes such an inordinately long time to complete, that in reality it does not constitute a system by which a non-member can recover that portion of the fees paid by him which is used for impermissible purposes. This burdensome demand and return system is in marked contrast to the very simple and effective system which in *Galda* the Court found inadequate to protect constitutional rights.

When confronted with the realities of union financing in this case, particularly in view of the fact that we are dealing with multiple tiers of unions, it becomes apparent that a demand and return system cannot protect a non-member's First Amendment rights. Those rights can be protected only if there is an advance determination of the amount to which the unions are entitled for collective bargaining services and only if the enforced payments are limited to those amounts.

From the conclusions set forth above, it follows that plaintiffs are likely to prevail on the merits.

B. Other Equitable Considerations

It becomes necessary to determine whether plaintiffs have established the other elements which are a prerequisite to granting a preliminary injunction.

Plaintiffs are suffering and, unless relief is granted, will continue to suffer deprivations of their First Amendment rights. The statute in question permits unions to collect fees and use them for certain impermissible lobbying expenses with no right in non-members to obtain a refund of their fees used for those purposes. Further, the statute permits the unions to use the involuntary fees of non-members for political and ideological purposes with a right to demand a refund through proceedings so onerous that they are unusable. The fact that each plaintiff's monetary stake is small does not render the deprivation of a constitutional right less important. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadack v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969).

The education association defendants and the AAUP defendants have no legitimate interest in receiving funds for purposes other than collective bargaining, contract administration and grievance processing.

The public and the education association and AAUP defendants have an interest in protecting the integrity and continued functioning of the collective bargaining process. To the extent that this depends upon payment of a fair share by non-members, they have an interest in the continued payment of the portion of the representation fees applicable to that process.

The public has an interest in insuring that public em-

ployees are not deprived of their First Amendment rights.

Balancing these interests precludes an immediate blanket injunction forbidding the collection of all representation fees until procedures meeting constitutional standards are adopted. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 775 (1961). However, further balancing these interests requires that plaintiffs be accorded certain preliminary injunctive relief which will minimize the injury inflicted upon them pending a final hearing and until a valid representation fee system can be established.

C. Preliminary Relief

The first constitutional defect in the New Jersey statute is the permission it gives to representatives of public employees to use non-member fees over the non-member's objections for lobbying purposes over and beyond lobbying designed to secure agency or legislative action required to implement a collective bargaining agreement. The AAUP defendants and the education association defendants will be preliminarily enjoined from using any portion of plaintiffs' representation fees for lobbying other than lobbying to secure such action. Further, those defendants will be ordered to include in any computations which they make of amounts refundable to plaintiffs any portion of plaintiffs' representation fees used for impermissible lobbying authorized by the New Jersey statute.

The second constitutional defect of the New Jersey statute rests in its permitting public employee unions to use

representation fees for political and lobbying purposes and its attempt to cure this deprivation by providing a demand and return system which is unduly burdensome. An examination of the rather voluminous factual record in this case suggests that ultimately the only cure for this unconstitutional deprivation of constitutional rights will be to shift the burden of establishing a proper representation fee from the individual non-members (where in effect the burden now lies) to the AAUP and education association defendants who receive the payments and have readily available to them both the financial resources and the accounting data required to do this work. The more one examines the facts and the realities of the situation the more one becomes convinced that the potential for serious constitutional deprivations will exist unless the organizations receiving the fees are required to establish in advance of payment the amount required to reimburse them for services rendered for collective bargaining, contract administration and processing grievances. The burden must be on them to establish this amount with detailed financial and other appropriate data which satisfies some impartial body capable of analyzing the data.

To enjoin payment of all representation fees until some such system is established might injure the collective bargaining process. To avoid that result such an injunction will not be issued at this time. An order will be entered, however, requiring that the portions of the representation fees paid by plaintiffs going to National AAUP and to the New Jersey Education Association and the National Education Association shall be placed in escrow with a third party and held until further order of the Court. These state and national organizations are

less directly involved in the collective bargaining process and will, in any event, be unlikely to feel any substantial impact as a result of their inability to use their portions of plaintiffs' fees. The Rutgers Council of AAUP and the local and county education associations are more directly involved in the collective bargaining process and may require their portions of the representation fees in order to perform their important functions. The record suggests that they are much less likely to engage in extensive political and lobbying activities than the state and national organizations and, therefore, it is less likely that the moneys they receive from plaintiffs will be used for those purposes. They will not be prohibited at this time from receiving their portions of plaintiffs' fees.

I appreciate that the loss of plaintiffs' representation fees will not critically affect the operations of any of the tiers of the organizations involved in this case, but in shaping the order to be entered I take into account the possibility that other non-members may seek similar relief.

The order will also provide that if a final hearing has not been held within six months, and if within that time there has not been established a representation fee system meeting constitutional requirements, plaintiffs may apply for additional injunctive relief.

Plaintiffs' attorneys are requested to submit to me and circulate among the other parties a proposed form or forms of order implementing this opinion on or before October 4, 1982. If there is disagreement as to the form, a hearing will be held at 2:00 p.m. on October 18, 1982

to settle the form of order.

Dated: September 28, 1982.

/s/ Dickinson R. Debevoise
Dickinson R. Debevoise
United States District Judge

APPENDIX A-2

Order of the U.S. District Court
Granting Preliminary Injunction in
Antonacci/ Robinson v. State of New Jersey, October 19, 1982.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH W. ANTONACCI, *et al.*, *Plaintiffs*, v. STATE OF NEW JERSEY, *et al.*, *Defendants*.	Civil Action No. 82-1119 consolidated with Civil Action No. 82-1118. Dickinson R. Debevoise United States District Judge
PAUL H. ROBINSON, *et al.*, *Plaintiffs*, v. STATE OF NEW JERSEY, *et al.*, *Defendants*.	**ORDER GRANTING PRELIMINARY INJUNCTION** October 19, 1982

This cause came to be heard on plaintiffs' motion for a preliminary injunction, and the Court having considered the verified complaints, answers, affidavits and exhibits submitted by plaintiffs and defendants, the memoranda of points and authorities in support of the motion submitted by plaintiffs, the briefs and memorandum of law in opposition to the motion submitted by defendants, and the Court having heard oral argument on the 10th day of June, 1982, the Court having made its findings of fact and conclusions of law as set forth in its opinion of September 28, 1982, IT IS ORDERED;

1. The AAUP defendants and the Education Association defendants are preliminarily enjoined from using any representation fees hereinafter paid by plaintiffs for lobbying purposes other than lobbying by the majority representative specifically to secure agency or legislative

action required to implement the collective bargaining agreement.

2. The defendants, National Education Association, New Jersey Education Association and the National American Association of University Professors are preliminarily enjoined from using any portion of representation fees hereafter paid by plaintiffs and received by said defendants for any purpose whatsoever other than to place such fees in escrow as set forth below.

3. The AAUP defendants and the Education Association defendants, their officers, agents, servants, employees and attorneys are ordered to place in escrow accounts mutually agreed upon by the parties (or, absent such agreement, designated by the Court) all representation fees hereafter collected from plaintiffs which would, under formulas previously established by the Education Association and AAUP defendants, be transmitted to the National Education Association, New Jersey Education Association and the National AAUP. Said funds may not be released without further order of this Court.

4. If a final hearing in this matter has not been held within six months and if within six months there has not been established a statutory representation fee system meeting constitutional requirements, plaintiffs may apply for additional injunctive relief.

5. Within sixty days of the date of this order defendants other than The Honorable Thomas H. Kean and Mr. James W. Mastriani shall serve upon the plaintiffs and file with the Court a statement or statements setting forth what steps they have taken or propose to take in

order to bring the representation fee system into compliance with constitutional requirements, including proposed statutory changes and changes in their systems of establishing the amount of representation fees which can lawfully be collected from employees who object to their use for purposes other than collective negotiations, contract administration and processing of grievances.

6. The question of an interim award of disbursements and attorney fees pursuant to *Fed.R.Civ.P.* 54(d) and 42 U.S.C. § 1988 will be deferred until a later date.

Dated: October 19, 1982.

/s/ Dickinson R. Debevoise

Dickinson R. Debevoise
United States District Judge

APPENDIX A-3

Opinion of the U.S. District Court
in *Olsen v. CWA*, March 16, 1983.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALLEN OLSEN, *et al.*,
Plaintiffs,

v.

COMMUNICATIONS WORKERS OF AMERICA (CWA), *et al.*,
Defendants.

Civil Action
No. 82-3443

OPINION

March 16, 1983
Debevoise, District Judge

Plaintiffs, employees of the State of New Jersey who are not members of the union which is the majority representative of their employment unit, instituted this action attacking the validity of N.J.S.A. 34:13A-5.5 and 5.6. These statutory provisions permit a public employer and a majority representative to include in a collective bargaining agreement provisions requiring non-members to pay a representation fee to the union. Plaintiffs also assert that they have been deprived of First Amendment rights to oppose implementation of the statute and to seek to persuade other State employees to join them in their opposition.

Defendants are Communications Workers of America, AFL-CIO ("CWA") (the majority representative), CWA District 1, CWA Locals 1031, 1032, 1033, 1034, 1037, 1038, 1039 and 1040, the State of New Jersey and Thomas H. Kean, Governor of the State of New Jersey.

In their complaint, plaintiffs seek to be designated representatives of a class pursuant to Fed.R.Civ.P. 23(b)(2) and (b)(3). The class is asserted to consist "of all public employees represented by CWA's locals, but

who exercised their right not to be a member of defendant union and, therefore, have paid, and are paying, a representation fee pursuant to [N.J.S.A. 34:13A-5.5 and 5.6]." Plaintiffs seek injunctive and declaratory relief, nominal and punitive damages, and attorneys fees and expenses of suit.

On December 6 and 7, 1982, a hearing was held on plaintiffs' application for preliminary injunctive relief. Decision was reserved. Thereafter, plaintiffs' motion for class certification was denied for the reason that the positions and interests of non-members of the union are likely to be diverse and for the reason that the principal objective of a class action can be realized by treating this as a test case. This opinion constitutes my findings of fact and conclusions of law upon the preliminary injunction application.

FINDINGS OF FACT

A. **The Statute:** The statutory provisions which are applicable in this case are described in the opinion in *Robinson v. State of N.J.*, 547 F. Supp. 1297, 1299-1301 (D.N.J. 1982).

B. **The Majority Representative:** CWA is a national labor organization which has established Districts as geographic subdivisions. The Districts are staffed and financed as divisions of the national union and are not independent organizations.

The national union charters local unions which are separate organizations, electing their own officers and setting their own budgets. Under the CWA constitution,

collective bargaining within the established bargaining units must be conducted under the direction of the CWA Executive Board, and all contracts and agreements entered into must be in the name of the national union.

In March 1981, CWA was certified as the majority representative for a State-wide unit of Administrative and Clerical State Employees. In August 1981, CWA was certified as the majority representative for three additional State-wide bargaining units consisting of Professional Employees, Primary Level Supervisors and Higher Level Supervisors. Eight State Locals were chartered by CWA for the purpose of representing employees in the four bargaining units—Locals 1031, 1032, 1033, 1034, 1037, 1038, 1039 and 1040. The Locals are not the certified bargaining representatives. Rather, as mentioned above, the CWA national union is the collective bargaining representative and signs all collective bargaining agreements.

Plaintiff Anderson is employed within Local 1032's jurisdiction (Department of Transportation and New Jersey Public Broadcasting Authority). Plaintiff Lang is employed within Local 1034's jurisdiction (Departments of Environmental Protection, Health, and Labor and Industry employed in Mercer County). Plaintiffs Olsen, Smartt and Harrington are employed within Local 1039's jurisdiction (Departments of Human Services, Corrections and Parole and Community Affairs employed in designated counties). Plaintiff Yull is not an employee in a CWA bargaining unit and, unlike the other plaintiffs, has not paid representation fees.

CWA and the State of New Jersey entered into nego-

tiations and in October 1981 the negotiations resulted in four two-year collective bargaining agreements (one for each bargaining unit), retroactive to July 1, 1981.

Article II, Section B(2) of each contract provides for the deduction of a representation fee in lieu of dues from the regular paychecks of non-union members in the respective units. Deductions commenced on or about July 12, 1982. The amount of the deduction is determined as follows:

> b. Amount of Fee
>
> Prior to the beginning of each contract year, the Union will notify the State in writing of the amount of regular membership dues, initiation fees and assessments charged by the Union to its own members for that contract year, and the amount of the representation fee for that contract year. Any changes in the representation fee structure during the contract year shall be in accordance with B.1.d. above.
>
> The representation fee in lieu of dues shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefiting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.

CWA member dues were set at an amount equal to two hours pay. Dues and representation fees are forwarded directly to national CWA. National CWA re-

tains 40% of the funds: it places 50 cents for each employee into a CWA Defense Fund; and it remits the balance of almost 60% to the locals. It will be noted that (subject to the 85% limitation) the representation fee is to be an amount equal to regular member dues, initiation fees and assessments less the cost of member only benefits but *not* less the amounts spent for activities of a partisan or political or ideological nature. This, of course, is consistent with the New Jersey statutory provision permitting representation fees.

Article II, Section B(2) of each contract also provides for the creation of a Demand and Return System:

> d. Demand and Return System
>
> The representation fee in lieu of dues only shall be available to the Union if the procedures hereafter are maintained by the Union.
>
> The burden of proof under this system is on the Union.
>
> The Union shall return any part of the representation fee paid by the employee which represents the employee's additional pro rata share of expenditures by the Union that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied toward the cost of other benefits available only to members of the majority representative.
>
> The employee shall be entitled to a review of the amount of the representation fee by requesting the Union to substantiate the amount charged for the representation fee. This review shall be accorded in

conformance with the internal steps and procedures established by the Union.

The Union shall submit a copy of the Union review system to the Office of Employee Relations. The deduction of the representation fee shall be available only if the Union establishes and maintains this review system.

If the employee is dissatisfied with the Union's decision, he may appeal to a three-member board established by the Governor.

C. **Details of the Demand and Return System:** In contrast to the Demand and Return System described in *Robinson v. State of N.J., supra*, CWA has established a highly sophisticated method for determining what expenditures are reimbursable, what expenditures are not reimbursable and how to apportion expenditures which are for both reimbursable and non-reimbursable items.

Under the New Jersey CWA Demand and Return System, an employee seeking reimbursement must submit a request in writing to CWA's secretary-treasurer in Washington, D.C. Upon receipt of the request, 40 percent of the payments received from the objecting fee payer is placed in an escrow account to be held until a rebate is paid to the objector and any dispute concerning the amount of the rebate has been resolved. The account bears interest at 5.25% annually and rebates to objectors include interest at this rate for the period their money is held. For the fiscal year ended September 30, 1982, CWA received more than 2000 rebate requests from workers employed by the State of New Jersey and represented by CWA.

The CWA Executive Committee determines the amount of the union's rebatable activities for the year on the basis of the calculation described below and on the basis of data which the CWA locals representing New Jersey State employees forward to the Executive Committee. The Executive Committee is required to make its determination by the January 1 following the close of the fiscal year.

Along with any rebate payment, an objector receives an explanation of the calculation and a copy of the policy statement explaining the appeals procedure. A fee payer who is dissatisfied with the amount of the rebate may appeal to an impartial hearing officer operating under the rules of procedure of the CWA Review Board, or he may appeal directly to the Appeal Board created by the New Jersey statute or he may appeal first to the CWA hearing officer and then to the New Jersey Appeal Board.

Effective February 13, 1981 CWA created a Public Review Board to decide complaints by members and non-members of CWA about rebates of sums paid to the union under union or agency shop contract provisions. The initial members of the Board were the Chairman of the Georgetown University Law Center, the President of Hunter College, and the minister of Peoples' United Church of Christ in Washington, D.C. CWA adopted detailed rules governing the filing of appeals with the Board and the procedures to be followed at hearings by the Board.

As mentioned above, CWA has developed a sophisticated procedure for determining reimbursable expendi-

tures and non-reimbursable expenditures and for apportioning expenditures which are devoted to both reimbursable and to non-reimbursable items. The necessity for developing this procedure arose in the course of an action in the United States District Court in Maryland in which Maryland employees of American Telephone and Telegraph Company and of Chesapeake and Potomac Telephone Company who had paid agency fees sought reimbursement for expenditures not made for collective bargaining, contract administration and grievance adjustment. *Beck v. Communications Workers of America.* Civil Action No. M-76-839. On May 3, 1979, the court referred the matter to Special Master Wilson K. Barnes. The Special Master filed his Report on August 18, 1980, ruling that CWA was entitled to retain 19% of its expenditures and was required to reimburse to the plaintiffs in that case 81% of its expenditures.

After the Special Master issued his Original Report, CWA and various local unions moved to recommit the matter to the Special Master to make additional findings on the basis of new evidence assembled by CWA. The motion was granted and the Special Master took additional testimony and received new exhibits. In his Supplemental Report the Special Master stated, "[t]he Defendants [CWA and various locals] have also accepted the holding that the record-keeping and bookkeeping methods of the Defendants before the filing of the Original Report were not adequate to enable them in a number of instances to meet the required burden of proof by clear and convincing evidence, and generally accept the method of calculations used by the Special Master in reaching the results in the Original Report. It is recognized that the 19 percent of permissible expendi-

tures (and 81 percent of nonpermissible expenditures) continue in effect until the Defendants are able to meet their burden of proof by clear and convincing evidence that other percentages are appropriate."

CWA sought by its additional evidence to show that it had developed a methodology which enabled it to establish a different (and higher) percentage of expenditures which it was entitled to charge to non-members in the form of agency fees. The new evidence consisted of testimony of and exhibits prepared by experts. The data which CWA has presented in this action are a somewhat modified version of the data presented to the Special Master.

CWA retained Edward C. Bryant, Chairman of the Board of Westat, Inc., a scientific survey research organization. He developed a system of time recording which would be capable of producing estimates of "retainable, nonretainable and administrative time for the employees of CWA." He also collected data by sampling procedures, developed forms and engaged in pretesting the data collections. The work which he performed and submitted to the Special Master is described in the Supplemental Report of the Special Master. This work and certain additional work which he and his firm performed after the Special Master issued his Supplemental Report are described in his affidavit filed in the present action.

Counsel for CWA had provided Bryant with a list of 25 descriptive categories of activities in which CWA engaged.[1]

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[1] The Special Master's Supplemental Report listed the categories pro-

The Westat Report allocated the 25 descriptive categories set forth in footnote No. 1 to five major categories: 1. *Retainable* (Nos. 1-9); 2. *Other Retainable* (Nos. 15 and 23); 3. *Administrative* (Nos. 10-13). The allocation of time in this category was to be made on the basis of the allocation of the nonadministrative time of each district or department; 4. *Allocable* (Nos. 6, 16, 20, 22 and 25). CWA contended that if the portion of the allocable activity was directly related to the working lives of CWA represented employees, it would be retainable and if the portion of the allocable activity was related to the everyday lives of CWA represented employees as citizens generally, it would be nonretainable; 5. *Nonretainable* (Nos. 14, 17, 18, 19 and 24).

Given these descriptive categories and major categories Westat devised the system described in the Bryant affidavit for determining and analyzing time spent by CWA employees on their various tasks so as to provide a basis

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vided to Bryant and used in the Westat Report as follows:

1. Formulating contract proposals, contract negotiations, and contract ratification; **2.** Handling questions and complaints about working conditions, benefits and contract rights; **3.** Handling grievances and arbitrations; **4.** Other meetings, phone calls, etc. with company representatives; **5.** Reading or discussing background information and news related to wages, working conditions, etc.; **6.** Government agency, board or regulatory body matters; **7.** Demonstrations, leafletting, strikes about CWA wages, working conditions, etc.; **8.** Steward meetings or training; **9.** CWA schools; **10.** CWA conventions or monthly, area, etc. meetings; **11.** CWA local union meetings; **12.** Local union administration; **13.** Office management and administration; **14.** Meetings or conventions of other labor organizations; **15.** Organizing; **16.** Legislative activities; **17.** Registration and get out the vote activity; **18.** COPE fundraising; **19.** Other political activity; **20.** Community service activity; **21.** Time off—e.g., sick time, vacation; **22.** CWA publications; **23.** Public relations; **24.** International affairs; **25.** Other.

for estimating reimbursable (nonretainable) and non-reimbursable (retainable) time.

Harvey J. Nuland, a certified public accountant with the firm of Buchbinder, Stein, Tunick & Platkin, also appeared as a witness before the Special Master. Nuland and his firm had been retained by CWA to recommend a system of apportionment that would distribute or categorize CWA's expenditures as reflected in its accounting system as reimbursable or nonreimbursable. The systems devised by Nuland are described in the Special Master's Supplemental Report and in Exhibits J and K to the affidavit of Emanuel Saxe filed in the present action. Nuland recommended, among other things, that the salaries of the 17 elected Executive Board members of CWA be considered as retainable and not subject to apportionment.

CWA also retained Dr. Emanuel Saxe, a certified public accountant and professor. He was asked to review the reports prepared by Nuland's firm and to determine their compliance with accepted cost allocating standards and thereafter to devise a program based on those standards which, when applied to the audited financial statements of CWA would yield data that would disclose the amount of retainable expenses and the amount of non-retainable expenses. Dr. Saxe devised such a program. It is described in the Special Master's Supplemental Report and in the Saxe affidavit filed in this action.

Plaintiffs in the Maryland District Court action also produced expert witnesses who challenged certain of the methods and conclusions of CWA's experts. It is unnecessary for present purposes to go into the details of

their opinions. Suffice it to say, they appeared to be as experienced and competent as CWA's very experienced and competent experts.

The Special Master reviewed the evidence and arrived at a number of conclusions. Those having the most pertinence for present purposes are:

> . . . the Court expected that the record-keeping position of the CWA Defendants at the time of the hearing before the Special Master would be in place and in actual operation so that they could be applied to the specific figures disclosed by the audited financial reports and records. This, however, has not been the case. The CWA Defendants produced evidence to set forth a system of record-keeping and allocation of costs which they hope and expect to apply *in the future*. This is clear from Nuland I and Nuland II, the Westat Report and the Saxe Format Report, as well as from the testimonies of Mr. Nuland, Dr. Bryant and Dr. Saxe, considered *supra*, and particularly at pages 8 through 28 of this Supplemental Report.
>
> b. There appears to be no dispute that the percentage of retainable (19 percent) and nonretainable expenditures (81 percent) held to be applicable in the Original Report continues in effect until modified upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of 19 percent of CWA expenditures were properly chargeable *in the future* to the Plaintiffs as Agency Fee Payors.
>
> . . .
>
> The new system designed by CWA experts is gen-

erally sufficient subject to the correction of certain defects, supplying certain omissions and being properly monitored and administered.

The Special Master has concluded, and so finds, that the new system as set forth in Nuland I, Nuland II, the Westat Report, the Saxe Format Study and in the testimonies of Mr. Nuland, Dr. Bryant and Dr. Saxe is *generally* sufficient, prima facie, to enable CWA to meet its burden of proof as set forth in the Original Report, provided, however, that certain defects and omissions, later mentioned, are corrected or supplied and provided further that the system is properly monitored and administered as later considered.

The Special Master is not unmindful of the various objections forcefully made by counsel for the Plaintiffs. He is however of the opinion that these objections either do not substantially affect the *general* sufficiency of the proposed new system or will be met and overcome by the proper monitoring and administration of the proposed new system.

After the Special Master issued his Supplemental Report on September 14, 1981, Dr. Saxe revised his format designed to enable an accountant to calculate retainable and nonretainable expenses. The first application of the Saxe Format in terms of a rebate calculation was made for the year ending March 31, 1982. That calculation resulted in a special report issued and certified by the accounting firm of Main Hurdman (Exhibit D to the Shepperson affidavit filed in this action). The special report concluded: "In our opinion the schedules referred to previously, present fairly the retainable (84.98%) and nonretainable (15.02%) expenses for the year ended

March 31, 1982, computed on the basis of the Westat study and in accordance with the format developed by Dr. Saxe."

Plaintiffs in the present case have filed the affidavit of Irving B. Ross, a certified public accountant who had participated as an expert on behalf of the plaintiffs in *Beck v. CWA*. Ross challenges the validity of the allocation computed by Main Hurdman on a number of grounds. Among the grounds are:

> 6. Main Hurdman, however, do not give their opinion on the CWA computation of Retainable Expenditures.
>
> . . .
>
> 7. Main Hurdman's special report was not prepared for the purpose of determining the portion of CWA's retainable versus non-retainable expenses for the fiscal year. Main Hurdman merely rearranged data provided to them by the CWA in accordance with the format developed by Dr. Saxe. They in fact state "we have performed no additional review or verification procedures".
>
> 8. In the Supplemental Report of Wilson K. Barnes, Special Master in the *Beck* litigation, certain changes were recommended in CWA's proposed system. The CWA computation of Retainable Expenses does not meet either its burden of proof or the criteria established by the Court in regard to its
>
> (1) treatment of organizing expenses,
>
> (2) its proper monitoring, and
>
> (3) its timeliness, specifically:
>
> (A) The CWA admits that its report is not in

conformance with the Special Master's conclusions with respect to its Organizing Categories.

(B) The Special Master as well as the expert witnesses stressed that monitoring the system is "extremely important." Although WESTAT monitored the data collection plan including interviewing employees on a sample basis, there was no monitoring of the data in terms of verifying that the timekeeping records accurately reflected actual employee activities.

(C) The computation for the year ended March 31, 1982, was not completed until September, 1982. This unreasonable time delay could increase the difficulty of any independent verification because of the risk of document and memory loss.

. . .

10. The specific agreed-upon procedures to test the veracity of a computation of retainable expenses should include but not be limited to the following:

(A) Review and testing of the worksheets which compile the retainable information. This procedure would include tests of the mathematical accuracy of the calculations including tracings to individual activity reports.

(B) Development of a program for testing the accuracy of the information contained on the source documents, i.e. the activity reports. This procedure would include the gathering of corroborating evidence which is sufficient, competent and reliable to afford reasonable assurance that the time

allocations are proper. Testing of corroborating evidence should include but not be limited to the examination of:

1. Travel vouchers,
2. Employee Job Descriptions,
3. Personnel Files,
4. Correspondence Files,
5. Other Work Progress Reports,
6. Individual Employee Interviews.

11. In connection with *Beck, et al. v. CWA, et al.*, the defendant Union has calculated its retainable versus non-retainable expenses and applied them to the agency fee payment it received from a group of Maryland private sector employees. No evidence has been provided among the *Olsen* documents to demonstrate that the same causal-beneficial relationship exists between the retainable/non-retainable expenses applicable to Maryland private sector employees and New Jersey public sector employees. Consequently, the veracity of any calculation in this regard lacks a sound accounting basis.

12. In addition to supporting the national CWA effort, the Plaintiff's representative fees are also expended at the district and local levels. The CWA is presently relying on a sampling system designed by the WESTAT Corporation to allocate its retainable and non-retainable expenses. This system is based on the assumption that all CWA districts are relatively homogeneous units. No evidence has been provided among the *Olsen* documents to substantiate that CWA's District retainable versus non-retainable expenses bear the same relationship to

New Jersey state government employees as they do to American Telephone and Telegraph Company and Chesapeake and Potomac Telephone Company employees in Maryland.

13. Each local makes its own rebate calculation based on guideline instructions from CWA national office. The veracity of all such calculations should be subject to the gathering of similar corroborating evidence as described in 10(B) herein. This factor is more critical in relation to the defendant locals in view of the fact that the suggested rebate calculation forms only require the reporting of detail concerning rebatable expenses and time and not *all* expenses and time. Furthermore, Schedule C of the forms which report officers' rebatable time is not the product of contemporaneous recordkeeping and therefore warrants expanded verification procedures.

It is unnecessary and impossible at the present juncture of this lawsuit to determine whether the Main Hurdman computation of retainable and non-retainable expenses is proper for constitutional purposes and for New Jersey statutory purposes. Assuming that a similar computation is made for the period July 12, 1982 to September 30, 1982 to which plaintiffs' demands for rebates relate, CWA's internal hearing procedure and ultimately New Jersey's Appeals Board would have to address that question. The Special Master's Supplemental Report and the Saxe, Bryant and Ross affidavits and the Main Hurdman special report filed in this case demonstrate the complexity of the question and the insurmountable difficulties an objecting employee would encounter were he

to seek to challenge the rebate computation.[3]

D. **Plaintiffs' First Amendment Activities:** Each of the plaintiffs in this action is a State employee in a unit for which CWA is the bargaining representative. None of the plaintiffs is a member of CWA and each objects to the deduction of representation fees from his pay as permitted by the New Jersey statute. Each of the plaintiffs has sought to organize resistance to the representation fees among fellow employees, and each has been threatened with disciplinary action as a result of his activities. There follows a recital of the events relating to the plaintiffs who testified at the preliminary injunction hearing.

1. **Olsen:** Plaintiff, Allen Olsen, is employed in the Department of Community Affairs. In May of 1982 he read in the newspapers that employees in the Department who were not CWA members would be required to pay a representation fee. He received an official notice of the deduction from his pay when he received his paycheck on July 15, 1982. On July 10, he had received from CWA a notice of its Demand and Return System.

Olsen disagrees with political and social positions which CWA takes and objected to the fee deducted from his pay for the reason that he had no way of knowing for what purpose the money would be spent. He communicated with the National Right to Work Legal Defense Foundation, Inc. to seek assistance in combatting what he considered to be a deprivation of his rights.

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[3] In a memorandum opinion dated March 4, 1983 the Maryland United States District Court adopted with minor modifications the original report of the Special Master as modified by the supplemental report.

The Fund provided Olsen with a specimen protest letter to be sent to the union and to state officials. Olsen showed the letter to his colleagues, and nineteen agreed to join with him in signing the letter and sending it to the President of CWA Local 1039 and to Frank Mason, Director of Employee Relations in the Governor's Office. Copies were mailed to the Commissioner of the Department of Community Affairs, the Chairmen of the New Jersey House and Senate Labor Committees and to the Chairman of PERC.

The letter was dated June 1, 1982. It was written on stationery bearing Olsen's home address. The letter protested the representation fee and asked that the constitutional rights of the signers of the letter be protected. It demanded that the State and CWA provide data to show what costs were incurred by the union for contract negotiation, contract administration and processing grievances.

On June 14, 1982 Mason responded. He alluded to the statute which authorized the deduction of a representation fee, referred to pending litigation which, he said, might affect actions taken by the State, and expressed regret that he was unable to satisfy Olsen's views on the issue.

Not having heard from the President of Local 1039, on June 25, 1982 Olsen, on behalf of the signers of the earlier letter, wrote another letter on his home stationery. It was addressed (and copied) to the same persons as those who received the first letter. The letter repeated Olsen's contentions that the deduction of representation fees was illegal until a proper amount was established in advance and requested that the deductions cease. There

was no response to the letter.

Olsen informed his supervisors of his activities and none had any objections.

The persons opposing the representation fees were loosely associated in an organization which they called Committee for a Rational Union Representation Fee. During the first or second weeks in July 1982, Olsen and plaintiffs William Anderson, Peter Yull, and Larry Lang prepared a Status Report addressed to Non Exempt Nonmembers of CWA. The Report stated that there was evidence that the amount of the representation fee was "at least four times as high as it should be."[3] The letter urged that demands for rebates be filed in a timely manner and described certain pending litigation contesting the New Jersey fee plan. A form of demand letter was included. The names of the four signers were typed on the report along with their telephone numbers.

On July 16, 1982, a memorandum was sent to all department managers. Its author was Valerie L. Sunkett, Principal Personnel Assistant, Bureau of Employee Relations. The subject: "Distribution of Literature from Employee Organizations other than the Certified Majority Representative." The memorandum stated:

> The Office of Employee Relations has advised us that it has come to their attention that some supervisors and managers have distributed or allowed the

[3] One can surmise that the calculation was derived from the conclusion of the Special Master in the Maryland District Court case that 81% of the agency fee involved there had to be refunded. The 81% figure was changed to 79% by the District Court after correcting one of the Special Master's calculations.

> distribution of literature from employee organizations other than the certified majority representative. With this in mind, we are advising all managers that there is a long standing State policy and a matter of commitment set forth in the various contracts between the State and the employee majority representative that the State, through its supervisors or managers, will not undertake to distribute any materials from employee organizations other than the majority representative. We are requesting that each manager advise their supervision that in no case should they distribute, post, or allow the distribution or posting of any literature from employee organizations other than the certified majority representatives.
>
> If you have any questions regarding this matter, please contact the Bureau of Employee Relations.

On or about September 15, 1982 Kenneth J. Horton, Personnel Officer, sent to Olsen a memorandum which read:

> We have been informed by the Office of Employee Relations that you have been engaging in the promotion of the interests of the "Committee for a Rational Representation Fee" using State time.
>
> This letter is to advise you that such activity is not permitted if it involves State time, equipment or the distribution of such literature.
>
> The Office of Employee Relations has also urged us to remind you that continuation of this type of activity can lead to disciplinary action.

Olsen's supervisor had been approached a week prior

to Olsen's receipt of the September 15 letter and had been asked to write a similar letter to Olsen.

On September 20, 1982 Olsen wrote to Horton, denying implications of misuse of State time and facilities and questioning the procedures which Horton pursued when receiving "third part allegations."

On September 30, 1982 Ms. Nancy Schaefer, Employee Relations Coordinator wrote Olsen to the following effect:

> Your memo to Kenneth Horton, Personnel Officer for the Department of Community Affairs was referred to me for response.
>
> The memo of September 15 you refer to did not "imply" misuse of State time and facilities. In fact, it was a misuse of State time and facilities and I directed the Department advise you to discontinue these activities if you had not already done so.
>
> The information was not, as you say, "third hand." In fact your supervisor spoke to you regarding distribution of such material on State property and it is my understanding you did admit to distribution of the leaflet. Your name and work number are clearly printed on the leaflet with an invitation to call you. Such information would be considered "first hand." Use of a State phone for business other than that of the State's is clearly inappropriate.
>
> The Governor's Office of Employee Relations has been the agent for developing and enforcing labor relations policy throughout the State. It has been a long standing policy of the State that distribution of

> *any* literature on State property at *any* time by *any* organization without the express permission of the State is not allowed.
>
> The Department is aware of the State's policies regarding union activity, as well as permissible activities spelled out in the negotiated agreement. Should you have any further questions regarding this matter please feel free to contact me.

Olsen wrote to Schaefer and asked for a copy of the State's policies concerning union/nonunion activities. Numerous other forms of literature are distributed in State offices by State employees concerning organizations, activities and contributions. Olsen received no reply to his inquiry.

2. **Lang:** Lang is employed in the New Jersey Department of Labor. He pursued a course of action similar to Olsen's.

He first obtained 44 signatures on a letter to the President of Local 1034 and to Frank Mason. It was similar in content to Olsen's first letter. He had received permission from his director to engage in this activity if he did it on his lunch hour, which he did. He distributed copies of the status report urging the filing of requests for rebates at this work place before 8:00 a.m.

On August 11, 1982, the Chief of Personnel Services wrote to Lang stating:

> It has come to the attention of this office that you have been using state time to promote the interests of the Committee For A Rational Representation

> Fee. This letter will serve as notice to you that you must cease and desist from such practice in the future if it involves state time, equipment, supplies, or the distribution of material in state offices.
>
> The Governor's Office of Employee Relations has urged us to remind you that continued activity of this sort can lead to a disciplinary action.

Lang had also became aware of the Valerie Sunkett memorandum of July 16, 1982 concerning the distribution of literature from employee organizations other than the certified majority representative. As a result of these communications, Lang removed all material concerning the representation fee from his office.

3. **Anderson:** Anderson's efforts to persuade fellow employees to contest the representation fee system followed the same course as Olsen's and Lang's. After initial approval of distribution of literature and discussions during lunch hours or breaks, Anderson was directed to stop his activities.

On August 5, 1982 Nancy Schaefer, Employee Relations Coordinator, wrote to Jeffrey Bodholt, Chief, Bureau of Employee Relations, Department of Transportation, as follows:

> Attached is a copy of a leaflet the CWA alleges is being distributed by employees of the State who are part of the "Committee." Please investigate and advise me as to whether the leaflet was distributed on State time and whether or not the employee in question has been receiving phone calls on work time.

> I would suggest you advise this employee in writing that such activity is not permitted on State time and continuation of this may lead to discipline.

Attached to the Schaefer memorandum was a copy of the July 15, 1982 Status Report of the Committee for a Rational Representation Fee urging employees to apply for a rebate.

On August 12, 1982, Bodholt wrote to Anderson as follows:

> This is to confirm my telephone conversation of August 10, 1982 wherein I advised you that the "Committee for a Rational Representation Fee" cannot distribute literature on State premises nor can persons accept calls on State telephones during working hours to discuss Committee business. Only the majority representative organization, the Communications Workers of America, has contractual rights to utilize State facilities as outlined in the Union Rights and Representative portion of the contracts.
>
> If you receive a call at your work telephone from employees interested in the Committee business, please advise the caller to contact you after working hours or on public telephones while you are at lunch, on your own time, or on your rest break. As I understand it, you indicated that the July 15, 1982 information sheet entitled "Status Report" (copy attached) was not distributed on the Department of Transportation premises. Any information the Committee wishes to disseminate can be accomplished off of State premises.

Your cooperation in this matter is appreciated.

4. **Yull:** Without detailing all the events, Yull experienced treatment similar to that described above. In addition, one episode illustrates the special consideration given to the union with respect to communications to employees.

Pursuant to Article XXVIIC of the various collective bargaining agreements, the union is given the right to maintain a bulletin board at each work place and to distribute literature in central locations. The material which may be posted on the bulletin boards or distributed to employees may concern union matters and matters of concern to unions generally. The *only* express limitations are that the "material shall not contain anything profane, obscene or defamatory of the State or its representatives and employees, nor anything constituting election campaign material."

At least one union bulletin board was used to post information attacking the Committee for a Rational Representation Fee and threatening those who espoused its goals. The circular involved read as follows:

> Fellow Workers:
>
> The National Right to Work Committee, an anti-worker, right-wing organization funded by the worst union busting corporations in America, is behind a drive to weaken your union. A front group of disgruntled State employees calling themselves "A Committee for a 'Rational' Union Representation Fee" along with a group called "United Professional Employees," is attempting to discredit your union

by spreading half truths and feeding on rumors. These cowardly individuals (many of whom are supervisors) refuse to use the Democratic procedures established in our union to resolve controversial issues. They prefer to attack our union—the only organization currently elected by State employees to help us defend our interests as workers. The National Right to Work (*FOR LESS*) Committee and its front groups do nothing but keep working people from getting decent wages and benefits for their families. They try to destroy the only organizations established to protect and defend workers—unions. Unlike unions, these groups are not controlled by workers. They do not hold elections. They are the exact opposite of the Democratic procedures they purport to defend. Recently, these anti-worker groups have been posting material on CWA bulletin boards. This is a violation of your contract. If you witness this happening, get the name of the individual and contact your steward or the Union office. *A grievance will be filed against any supervisor posting anti-union material on these boards, or handing out anti-union material on the job.*

DEFEND YOUR CONTRACT—DEFEND YOUR UNION—DEFEND YOUR FAMILY. JOIN CWA —BUILD YOUR LOCAL—STOP ATTEMPTS TO ATTACK YOUR UNION.

5. **General Observations:** It is quite apparent from the evidence that plaintiffs' activities when opposing the representation fee were consistent with previously permitted conduct by State employees on State property. Most of these activities took place before work or during breaks or lunch hours. Use of the phone was limited in

nature and of a kind generally permitted in the offices where they worked. The distribution of literature was an activity in which employees were permitted to engage for other non-employment related causes. Under the collective bargaining agreement, however, the State has agreed that one group of employees (members of CWA) may express themselves on bulletin boards and through the distribution of literature, while non-members may not enjoy the same privilege.

I find that the sole reason plaintiffs were directed to cease their activities on behalf of the Committee for a Rational Representation Fee and were threatened with discipline was because of the ideas and policies which they advocated. Their activities in no way interferred with their work and in no way intruded upon other employees. The State, apparently at the instigation of the union, sought to prevent expression of the views and policies espoused by plaintiffs.

CONCLUSIONS OF LAW

The Court has jurisdiction over this action by virtue of 28 U.S.C. § 1343 to provide remedies for causes of action arising under 42 U.S.C. § 1983.

Plaintiffs, who now seek preliminary injunctive relief, must show: (i) a reasonable probability of ultimate success on the merits of the litigation, (ii) irreparable harm to themselves if the injunction is not granted, (iii) the absence of countervailing harm to other interested persons if the injunction is granted, and (iv) the absence of countervailing public interests should the injunction be

granted. *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1981).

Three substantive issues must be addressed at this time to determine whether plaintiffs have a reasonable probability of ultimate success on the merits: (i) Did the actions which the state and the union defendants took to prevent plaintiffs from expressing their views through the Committee for a Rational Representation Fee violate plaintiffs' First Amendment rights? (ii) Did I correctly decide in *Robinson v. State of N.J., supra*, that the New Jersey statutory provision permitting the majority representative to use non-members' fees for certain lobbying purposes is unconstitutional? and (iii) Does CWA's demand and return system adequately protect plaintiffs' First Amendment rights?[4]

A. **Plaintiffs' Rights to Express Themselves:** As described above, plaintiffs' superiors, upon the urging of union officials, have forbidden plaintiffs to express their views about the representation fee procedures on state property and have threatened them with disciplinary action if they do so. The conclusion is inescapable that this action was taken because of the content of plaintiffs' speech and writings and not because of any interference

[4] At this time it is unnecessary to address the different constitutional and statutory questions which plaintiffs raise as to the propriety of charging non-members for union expenditures for items such as representing employees before the New Jersey Civil Service Commission, union organizational efforts, the union sponsored newspaper, and the CWA "Defense Fund" designed to assist members who go on strike. It may well be that the New Jersey courts first should decide if these are expenses which the New Jersey statute permits to be charged to non-members before a federal court reaches the constitutional issues. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

with their work or the work of any other state employees. The prohibition extends to activities during recess and recreation periods and it extends to activities conducted on all portions of state property - hallways, sidewalks, dining rooms, and social areas as well as offices and other work areas.

It is well established that pubic employees have protected First Amendment rights. *Linker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). The First Amendment prohibits governmental discrimination among viewpoints on particular issues falling within the realm of protected speech. *Niemotko v. Maryland*, 340 U.S. 268 (1951). Such discrimination has occurred in this case. The State has permitted pro-union views to be expressed both on the bulletin board devoted exclusively to union materials and apparently elsewhere. The State has prohibited contrary views from being expressed anywhere or at anytime on state premises. This is a clear violation of plaintiffs' First Amendment rights.

The recent Supreme Court case of *Perry Education Assn. v. Perry Local Educators' Assn.*, 51 U.S.L.W. 4165 (Feb. 23, 1983) is instructive. There the Court upheld a collective bargaining agreement provision which gave the exclusive bargaining representative access to the interschool mail system and teacher mailboxes and denied such access to a rival organization. The Court found that the internal mail system was not a public forum and held that exclusive use was necessary to permit the bargaining representative to perform its responsibilities effectively. This reasoning would tend to validate the provision in the contract involved in this case granting

CWA the exclusive use of certain bulletin boards in working areas.

The reasoning of *Perry*, however, clearly does not validate the State's actions in the present case which prohibit those opposed to the union's representation fee system from expressing their views anywhere on State property. In fact, the language in *Perry* suggests that the Court would consider such a prohibition unlawful:

> The exclusive access policy applies only to use of the mailboxes and school mail system. PLEA is not prevented from using other school facilities to communicate with teachers. PLEA may post notices on school bulletin boards; may hold meetings on school property after school hours; and may, with approval of the building principals, make announcements on the public address system. Of course, PLEA also may communicate with teachers by word of mouth, telephone, or the United States mail.

51 U.S.L.W. at 4166.

> There is, however, no indication that the school board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the status of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The

> touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Id. at 4168.

> Finally, the reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. These means range from bulletin boards to meeting facilities to the United State mail. During election periods, PLEA is assured of equal access to all modes of communication. There is no showing here that PLEA's ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system. The variety and type of alternative modes of access present here compare favorably with those in other non-public forum cases where we have upheld restrictions on access.

Id. at 4170

In the present case, unlike *Perry*, plaintiffs were not only excluded from communicating with fellow employees via the bulletin boards, they were excluded from communicating with fellow employees anywhere on State property, regardless of whether the areas constituted public or non-public fora. The reason they were so excluded was because they espoused views which were hostile to those of CWA and its members. This is a clear violation of the First Amendment.

The statute upon which plaintiffs rely, 42 U.S.C.

§ 1983, provides a cause of action based upon conduct by a person acting under color of state law which subjects the complainant to deprivation of federally protected rights, privileges or immunities—in this case a deprivation of First Amendment rights of free speech, rights made applicable to the states by the Fourteenth Amendment. Conduct of a private party, not acting against a backdrop of state compulsion or involvement, does not give rise to a § 1983 claim. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

In the present case there can be no doubt that the conduct of the personnel officers and of plaintiffs' supervisors constituted state action. In addition, there was sufficient union involvement with state officials in the actions designed to prevent plaintiffs from communicating their views to constitute the conduct of the union state action for § 1983 purposes. CWA negotiated and entered into the collective bargaining agreement with the State pursuant to a State statute which permitted CWA to become the exclusive bargaining representative for State employees in designated employment units. The agreement (lawfully) gave the union the exclusive right to use certain bulletin boards to advance its interests and views. The union used at least one of these bulletin boards to attack plaintiffs' views. The union then succeeded in persuading state officials to order plaintiffs to cease communicating on State property concerning the representation fee and to threaten disciplinary action if they did. Thus the union and the State acting together deprived plaintiffs of federal rights. This is sufficient to constitute the actions of the union state action within the meaning of § 1983. *Dennis v. Sparks*, 449 U.S. 24 (1980); *Adickes v. Kress & Co., supra; Henderson v.*

Fisher, 631 F.2d 1115 (3d Cir. 1980).

On this issue plaintiffs have established a likelihood of success on the merits. Deprivation of First Amendment rights constitutes irreparable injury. There are no legitimate interests of the defendants which would be adversely affected by enjoining continuation of the kind of conduct of which plaintiffs complain. The interest of the public would be served by protecting plaintiffs' First Amendment rights.

A preliminary injunction will issue enjoining defendants from forbidding plaintiffs to speak or write on State property concerning union or representation fee issues and from disciplining plaintiffs should they engage in such activities and, in the case of the union defendants, from seeking to persuade State authorities to engage in such forbidden conduct. The injunction will be drafted so as to permit the State to comply with its collective bargaining agreement provisions governing CWA's use of bulletin boards and so as to permit reasonable regulations of general application as to the time, place and manner in which State employees may engage in non-work related communications, provided such regulations do not discriminate on the basis of views expressed about union matters, representation fees and employee relations generally.

B. **Lobbying:** In *Robinson, supra*, I held that the provision of N.J.S.A. 34:13A-5.5c permitting labor organizations to use the representation fees of public employees for lobbying activities designed to foster "policy goals in collective negotiations and contract administration or to secure for the employees represented advan-

tages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer" violated the First Amendment rights of non-member employees. I concluded that the New Jersey statute went beyond the kind of lobbying to which the Supreme Court has held representation fees may be applied, namely, "subsequent approval [of the collective bargaining agreement] by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Abood v. Detroit Board of Education*, 431 U.S. 209, 236 (1977).

Defendants in the present case ask that I reconsider my previous ruling. CWA urges two grounds for reconsideration.

First, CWA argues that collective bargaining in New Jersey may lead to an agreement by the parties to lobby for a change in legislation, and that this would, under my reasoning in *Robinson*, permit a union to use representation fees to lobby to obtain "subsequent approval" of that agreement, *i.e.*, to lobby for legislative changes. If this can be done, so the argument goes, it is irrational to forbid the union to use representation fees to lobby for the legislative changes in the first place. CWA's rationale would permit the union and the employer to insert a provision in a collective bargaining agreement to lobby for any legislation they thought appropriate and then use non-members' fees to lobby for it. I do not understand *Abood* to so hold and I do not believe that a non-member's First Amendment right to refrain from advocating social and political views can be so easily destroyed.

CWA's second argument is more persuasive. It points out that many subjects such as pensions and protection against layoffs which are the subject of bargaining in the private sector are established by State legislation when the State is the employer, and thus, under New Jersey cases such as those cited in *Robinson*, are removed from the bargaining process. In order to achieve improvements in these provisions the union must lobby and, according to CWA, non-members should pay their fair share of the benefits received through the lobbying process.

One problem which this thesis presents is that the range of subject matters which can be brought under the New Jersey statutory umbrella is virtually unlimited. There are few subjects of general concern which cannot be deemed to affect "policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer." The breadth of the lobbying which CWA contends is permitted by the statute is suggested by the affidavit filed by CWA of Paul Goldberg, Director of Field Services of the American Federation of State, County and Municipal Employees, AFL-CIO:

> Because the employer in the public sector is the state or local government itself, the Union must both work closely with appointed and elected officials and take positions before legislative bodies on matters affecting public employee wages, hours and working conditions including *budgets, tax reform, civil service reform, collective bargaining rights and*

> *legislation, health institutions, pensions, discrimination and civil rights issues affecting employees.*
>
> . . .
>
> Examples of the Union's lobbying efforts range from testifying in favor of legislation authorizing *collective bargaining in the public sector, to opposing the effects of deinstitutionalization on employees of public health institutions to advocating tax reform to ameliorate the effects of property tax cutbacks on public sector employees.*
>
> . . .
>
> Approximately five hundred bills pending in the New Jersey legislature would have a direct impact on collective bargaining and public employee wages, hours and working conditions. Included in the subjects addressed by these bills are *occupational safety and health, workers' "right to know" about hazardous chemicals in their workplace, changes in New Jersey's CAP" law which sets a 5% cap on government budgets and spending and thus limits monies available for public employee wages and benefits, and numerous other measures regarding state services, state aid to local governments and tax revenues.*

(Emphasis added.)

These matters concern many if not most of the principal public issues with which the New Jersey legislature must deal—the extent of collective bargaining rights, the State budget, tax policy, assistance to municipalities, limits on municipal spending, how health care is to be provided and paid for. All, of course, can be said to have some effect upon State employees.

Unions have every right to lobby with respect to these issues. However these issues, involving as they do important questions of public policy, are the subject of intense debate and disagreement. To permit the majority representative to use representation fees to pay for lobbying on these questions is to compel non-members to pay to support policy views which they may consider unwise or abhorrent. If CWA's arguments were accepted, representation fees could be used to lobby with respect to practically all significant legislative questions. There would be practically no limit on the use of representation fees for lobbying purposes. This would constitute a major breach of non-members' First Amendment rights. I do not believe *Abood* contemplated such a result.

Consequently I reaffirm the conclusion I arrived at in *Robinson*. As in *Robinson*, the union defendants will be preliminarily enjoined from using any portion of plaintiffs' representation fees for lobbying other than lobbying to secure agency or legislative action required to implement a collective bargaining agreement.

In light of CWA's first argument described above, the order will include language designed to prevent the defendants from evading what I consider to be the intent of *Abood*. Plaintiffs' First Amendment rights cannot be permitted to be lost through the vehicle of provisions in collective bargaining agreements which obligate the employer and the union to lobby for all manner of causes having some effect on public employees. I suggest a provision in the order which would specify that "lobbying to secure agency or legislative action required to implement a collective bargaining agreement" shall be deemed to encompass lobbying designed to secure budget-

ary and appropriation legislation to provide funds to pay for benefits and programs contained in a collective bargaining agreement. However, I am receptive to suggestions of the parties as to alternative language which would insure conformity with *Abood* by preventing unlimited lobbying with non-members' fees.

C. **CWA's Demand and Return System:** In *Robinson* I found that the demand and return systems of the union defendants in that case were such that a non-member's fee was taken under circumstances where he did not know in advance of payment and was unable to ascertain after payment whether the fee was used for political and ideological purposes which he opposed. I also found that the demand and return systems which were the subject of that case placed such heavy burdens on the objecting non-members and took such an inordinately long time to complete that in reality it does not constitute a system by which a non-member can recover the portion of the fee paid by him which is used for impermissible purposes. I concluded that the demand and return systems in that case could not protect a non-member's First Amendment rights and that "[t]hese rights can be protected only if there is an advance determination of the amount to which the unions are entitled for collective bargaining services and only if the enforced payments are limited to those amounts." 547 F. Supp. at 1322.

There are substantial differences in the demand and return system in the present case and the systems which were under review in *Robinson*. Here, as a result of the Maryland District Court case, there is in place a complex and highly sophisticated method for allocating

expenditures between those which the CWA considers reimbursable to non-members and those which CWA considers non-reimbursable. CWA escrows 40% of the fees paid by objecting non-members. There is formal procedure which CWA has established to hear claims for reimbursement. One does wonder how the busy persons who comprise CWA's outside hearing board can possibly spend the time required to adjudicate properly the complex issues involved in the various claims for refunds arising in the many jurisdictions having differing representation fee statutes. However, the existence of such a board demonstrates CWA's efforts to involve disinterested persons in the process.

The question still remains whether even CWA's more sophisticated system adequately protects the First Amendment rights of objecting non-members. The time lag between filing an objection and resolution of the objection is very great. In order to obtain an authoritative adjudication of the various complex legal and factual issues it is still necessary to pursue intra-union remedies and then to appeal to New Jersey's Board of Appeals and from it to the New Jersey courts. I will defer passing on the constitutionality of this system for the time being.

In *Robinson*, in deference to the important role the union defendants were filling, I did not enjoin forthwith collection of representation fees from the plaintiffs in that case. Instead, I required that a portion of the plaintiffs' representation fees be placed in escrow and provided that if a final hearing were not heard in six months and if within that time there had not been established a representation fee system meeting constitutional require-

ments. I would entertain an application for additional injunctive relief.

Since I entered the order implementing the opinion in *Robinson* the union defendants in that case have devised new procedures for implementing their demand and return systems which they contend meet constitutional requirements. On May 3, 1983 a hearing is scheduled at which there will be considered, among other matters, the constitutionality of the revised systems. There will be added to the May 3 agenda the question whether CWA's system meets constitutional requirements. If any of the parties in this case wish to submit additional briefs on that question, they may do so on or before April 25. They will also have an opportunity to argue that question on May 3. The decisions I reach in the various cases are obviously interrelated and if there are appeals, the Court of Appeals should have the opportunity to hear all the cases at the same time. I shall try to enter appropriate orders granting or denying injunctive relief in all cases on the same date.

In the meantime, in view of CWA's escrow procedure it is unnecessary to require the escrow of additional portions of plaintiffs' representation fees.

Plaintiffs are requested to submit a form of order in conformity with this opinion.

/s/ DICKINSON R. DEBEVOISE
DICKINSON R. DEBEVOISE
U.S.D.J.

DATED: March 16, 1983.

APPENDIX A-4

Order of the U.S. District Court
Granting Preliminary Injunction in
Olsen v. CWA, May 11, 1983.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALLAN OLSEN, *et als.*, *Plaintiffs,* *vs.* COMMUNICATIONS WORKERS OF AMERICA, *et als.*, *Defendants.*	Civil Action No. 82-3443 Hon. Dickinson R. Debevoise **ORDER GRANTING PRELIMINARY INJUNCTION** May 11, 1983

THIS CAUSE came to be heard on plaintiffs' Motion for a Preliminary Injunction, and the Court having considered the Verified Complaints, Answers, Affidavits, and Exhibits submitted by the plaintiffs and defendants, testimony presented at a hearing on December 6 and December 7, 1982, the Briefs and Memorandums of Law submitted in support of and in opposition to the Motion, and the oral arguments of counsel, and the Court having made its findings of fact and conclusions of law as set forth in its Opinion of March 16, 1983;

IT IS ORDERED:

1. The CWA defendants, including the National Office of Communication Workers of America, the Office known as "District One", and the Locals representing the bargaining units of which the plaintiffs are members, are preliminarily enjoined from using any representation fees hereinafter paid by plaintiffs for lobbying purposes other than lobbying by the majority representative, specifically to secure agency or legislative action required to implement the collective bargaining agreement in force between the majority representative and the State of New Jersey, as employer.

2. [Deleted by the Court]

3. All parties may present further Briefs or evidence with regard to the validity of the demand and return system maintained by CWA on or before April 25, 1983, and the same will be considered by the Court at a hearing on May 3, 1983, following which the Court shall issue such further Orders as may be appropriate.

4. All defendants, both the State of New Jersey as the State executive employer and the CWA and its subsidiaries, shall not prevent or threaten to prevent by disciplinary action, charges of unfair labor practices, or other means, the plaintiffs from speaking or writing about union or representation fee issues on State property based solely on the views which they hold or espouse, or their membership or non-membership in formal or informal employee organizations, provided, however, that the State may enforce standards governing employee behavior generally, (i.e. that these plaintiffs shall be treated in a manner essentially comparable to all other State employees) and that the State defendants may continue to administer the provisions of the collective bargaining agreement between it and the CWA, including those provisions governing the Union defendants' use of bulletin boards located in State offices.

5. The CWA defendants are preliminarily enjoined from taking any action to persuade or influence the State, through formal or informal processes, to take any action against these plaintiffs or others based on their espousals of views contrary to those of the Union or their membership in a formal or informal employee organization other than the CWA.

6. To the extent that plaintiffs' Motion for Preliminary Injunction demands the enjoining of all collections of representation fees made pursuant to N.J.S.A. 34:13A-5.5 and 5.6, the same is hereby deferred until further consideration by the Court. The deferral of consideration of the application for such injunctive relief is conditioned on the continued maintenance by the National Office of CWA of an escrow of 40% representation fees received from plaintiffs.

7. To the extent that the plaintiffs' seek a Preliminary Injunction barring the expenditure by CWA of any representation fees collected from the plaintiffs for specific Union expenditures other than lobbying, including organizational efforts aimed at recruiting non-members into the Union, representing employees before the New Jersey Civil Service Commission, other litigation activities, the cost of the National and State CWA newsletter, and the contribution to a "defense fund", the same is hereby deferred until further consideration by the Court.

8. The Court's prior Orders denying plaintiffs' Motion for Certification of a Class Action defined as a class consisting of all persons paying representation fees to the Union are hereby renewed and incorporated herein.

9. The question of an interim award of disbursements and attorneys fees pursuant to Fed. R. Civ. P. 54(d) and 42 U.S.C. § 1988 will be deferred until a later date.

/s/ DICKINSON R. DEBEVOISE

DICKINSON R. DEBEVOISE

DATED: May 11, 1983

APPENDIX A-5

Opinion of the U.S. District Court
in *Robinson/Antonacci/Olsen v. State of New Jersey/CWA*, June 15, 1983.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL H. ROBINSON, *et al.*, *Plaintiffs,* v. STATE OF NEW JERSEY, Thomas H. Kean, Governor, *et al.*, *Defendants.*	:	Civil Action No. 82-1118
JOSEPH W. ANTONACCI, *et al.*, *Plaintiffs,* v. STATE OF NEW JERSEY, Thomas H. Kean, Governor, *et al.*, *Defendants.*	:	Civil Action No. 82-1119
ALLEN OLSEN, *et al.*, *Plaintiffs,* v. COMMUNICATIONS WORKERS OF AMERICA (CWA), *et al.*, *Defendants.*	:	Civil Action No. 82-3443
	:	June 15, 1983

OPINION

DEBEVOISE, District Judge.

Plaintiffs in these three cases challenge the constitutionality of the provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the Act), which permit public employers to withhold and

majority union representatives to receive representation fees assessed against employees who are not members of the union. It is now necessary to determine whether additional preliminary injunctive relief must be granted.

PROCEDURAL BACKGROUND

In April 1982 plaintiffs in the *Robinson* and *Antonacci* cases (now consolidated) filed their complaints. On September 28, 1982 I rendered an opinion in which I concluded: (1) N.J.S.A. 34:13A-5.5(c) is unconstitutional to the extent that it permits use of representation fees over a non-member's objections for "lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the employer" and (2) N.J.S.A. 34:13A-5.5 and 5.6 "violate plaintiffs' constitutional rights in that (i) these statutory provisions permit labor organizations to receive and use plaintiffs' representation fees for political, ideological and impermissible lobbying purposes over plaintiffs' objections, and (ii) the demand and return system purportedly designed to enable plaintiffs to recover the portion of their representation fees used for political, ideological and impermissible lobbying purposes does not avoid or cure the improper use of representation fees because it is extraordinarily cumbersome and places heavy burdens upon a claimant."

I entered an order preliminarily enjoining the defendant union from using any portion of plaintiffs' representation fees for impermissible lobbying. In light of the strictures in *International Ass'n of Machinists v. Street*, 367 U.S. 740, 771-775 (1961), I did not at that time enjoin collection of representation fees from plaintiffs.

Instead I entered an order requiring that certain portions of the fees be placed in escrow and providing that if within six months from the date of the order a representation fee system meeting constitutional requirements had not been established, plaintiffs could apply for additional injunctive relief. *Robinson v. State of N.J.*, 547 F. Supp. 1297 (D.N.J. 1982), appeal pending.

In October 1982 plaintiffs in the *Olsen* case filed their complaint. On March 16, 1983 I rendered an opinion in which, among other things, I reaffirmed my earlier ruling that the lobbying provisions of N.J.S.A. 34:13A-5.5(c) are unconstitutional, and I deferred passing on the constitutionality of CWA's demand and return system until the return date in *Robinson* and *Antonacci* when I was to determine if a representation fee system had been established in those cases which met constitutional requirements. *Olsen v. Communications Workers of America (CWA)*, 559 F. Supp. 754 (D.N.J. 1983), appeal pending.

On May 3, 1983 a hearing was held on that question in all three cases and on various summary judgment motions which the parties had filed in *Robinson* and *Antonacci*. This opinion is directed to the adequacy of the demand and return systems in the three cases as they now exist and to the need for additional preliminary injunctive relief.

THE FACTS

The statute is described in some detail in *Robinson*. The very rudimentary demand and return systems originally established by the AAUP units and the teacher association units are described in *Robinson*. The highly

sophisticated CWA demand and return system which CWA instituted is described in *Olsen*. The other facts pertinent to the present inquiries are set forth in those cases and are incorporated by reference.

Nothing was done after I entered the order in *Robinson* and *Antonacci* either by the defendants in those cases or by the New Jersey legislature to seek to cure or to cure the constitutional defects in the representation fee statute. The union defendants devised and prepared to implement new demand and return systems. The new systems contemplate escrowing a sufficient portion of each objecting non-member's representation fee to ensure that no part of the fee would be spent for political, ideological or improper lobbying purposes prior to exhaustion of the union and state demand and return procedures. The new systems also contemplate the creation of revised union demand and return procedures whereby the unions would be required to establish before outside, independent arbiters the correctness of their fees and the absence of improper expenditures from such fees. Further, the *Robinson* and *Antonacci* union defendants take the position that any objecting non-member may skip the union's demand and return system and proceed directly to the State board of appeals.

These attempts by the *Robinson* and *Antonacci* unions to create effective demand and return systems and the demand and return system established by CWA represent good faith attempts to devise systems which can impartially and accurately determine what portion of a non-member's representation fee is used for contract negotiation, contract administration and processing grievances and what portion is used for other purposes. Sincere and conscientious as these efforts have been, however,

they do not avoid or cure the basic constitutional defects in the New Jersey statute.

CONCLUSIONS OF LAW

N.J.S.A. 34:13A-5.5b provides that the representation fee "shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members" less the cost of benefits available only to members and subject to a maximum of 85% of regular membership dues, fees and assessments. Unless in any case the aggregate cost of member only benefits and of political, ideological and impermissible lobbying activities happens to be less than 15% of regular membership dues, fees and assessments, the statute compels an objecting non-member to pay for the union's partisan political and ideological activities. The only recourse which the objecting non-member has is to proceed under a demand and return system provided for by the statute. I described the original systems involved in *Robinson* and *Antonacci* as follows:

> I set forth in some detail in the findings of fact in this case the efforts which various of the plaintiffs expended in an attempt to pursue the demand and return system contemplated by the New Jersey statute. Were it not apparent from the face of the statute, it certainly becomes apparent when one reviews these facts that the demand and return system created by N.J.S.A. 34:13A-5.6 imposes heavy burdens on a non-member who pays a representation fee to a multi-tiered union. Even though the burden of proof is on the union, that initial burden can be readily met, as it was in the case of the AAUP and education association proceedings in

> this case. In each case very simple and conclusory statements as to expenditures were submitted by each union tier--two tiers in the case of AAUP, four tiers in the case of the education associations. Confronted with such a showing, the non-members must then go behind those statements to test not only the propriety of the accounting involved but also the assumptions which were made in allocating expenses to member-only benefits, partisan political activities, and varying kinds of lobbying activities. This the non-members must do before the internal union bodies and then before an administrative law judge. They must proceed before the Appeal Board after the administrative law judge makes his findings and recommendations and they are confronted with an appeal to the Appellate Division of the Superior Court of New Jersey and possibly to the New Jersey Supreme Court.

547 F. Supp. at 1318-1319.

It has been a useful exercise to examine the CWA demand and return system and the new systems devised by the *Robinson* and *Antonacci* unions after my original opinion in that case. These constituted genuine attempts to create as effective demand and return systems as human ingenuity could devise. Yet each system is complex and overwhelmingly burdensome. Each requires an objecting member to expend such major efforts to pursue his remedy that no individual could be expected to avail himself of the remedy. Thus under the very best demand and return system no objecting non-member can devote the time and money required to ascertain and, if warranted, regain the portion of his representation fee which the union may use for political and ideological purposes.

The statutory requirement of a demand and return system is an illusory remedy. As a practical matter, therefore, the statute permits a union to take the funds of objecting non-members and use them for the union's own political and ideological purposes. The good faith efforts of the union defendants in these cases to create workable systems demonstrate that no demand and return system can protect an objecting non-member's First Amendment rights.

The union defendants have urged that a non-member has the right to skip the union procedures altogether and to proceed directly before the State appeals board. Even if the New Jersey statute were interpreted to permit such a direct appeal, the burden on the non-member would remain substantial—so substantial that no non-member could be expected to pursue the remedy. The time to pursue the remedy to its completion would be shortened, but it would remain very great, as described in the original *Robinson* opinion, 547 F. Supp. at 1314.[1]

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[1] Plaintiffs have urged that the representation fee statute's demand and return system violates their rights to procedural due process as well as their substantive First Amendment rights. Plaintiffs note that in the first instance an objecting non-member must pursue his claim in a tribunal established by the union against which the claim is made. They further note that an appeal from an adverse determination of the union's tribunal is to an appeals board, two of the three members of which might well have an interest in the outcome—the member representative of public employers and the member representative of public unions. Under the statute only one of the three members is characterized "as a strictly impartial member." However, the State courts have permitted the appeals board to proceed without the appointment and participation of the "impartial member," *Olsen v. State of New Jersey*, Docket No. C-4286-81E (Super. Ct. Chan. Div. July 12, 1982), appeal pending, leaving the decision to the two members who might have an interest in the outcome.

Since I have concluded that the statute violates plaintiffs' substantive

In the original *Robinson* decision I set forth the reasons why I concluded that New Jersey's representation fee system results in an unconstitutional deprivation of objecting non-members' First Amendment rights and that plaintiffs were likely to prevail on the merits, 547 F. Supp. at 1317-1322. Defendants urge that the United States Supreme Court's dismissal of the appeal in *Threlkeld v. Robbinsdale Federation of Teachers, Local 872, AFL-CIO*, 74 L.Ed.2d 40 (1982), requires a different result. An analysis of that case does not support defendants' contentions.

In 1974 Minnesota adopted a "fair share" statute, Minn. St. 179.61 to 179.77, which provided that public employees who were not members of the exclusive bargaining representative could be required to pay through a check off system a fair share fee for services rendered by such representative in an amount not to exceed the non-members' pro rata share "of the specific expenses incurred for services rendered . . . in relationship to negotiations and administration of grievance procedures." Plaintiff school teachers, who were not members of the union, sued in Minnesota state court to invalidate the statute. The trial court held that the statute violated the due process clauses of the Minnesota and United States Constitutions because there was no provision for notice and hearing prior to the determination of the fair share fee. The union appealed to the Minnesota Supreme Court.

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due process rights, it is unnecessary to determine this procedural due process question. *Cf. United Farm Workers of America, AFL-CIO v. Arizona Agricultural Employment Relations Board*, 696 F.2d 1216 (9th Cir. 1983).

The Supreme Court of Minnesota held that an employee who contended that a fair share fee was imposed in violation of the statute:

> has (a) the right to notice of the amount of an impending fair share fee which is to be deducted from his earnings; (b) the right to bring an action in district court to enjoin the use of the withheld fee; (c) the right, under certain exigent circumstances, to have the collection of the fair share fee enjoined; and (d) the right, in all circumstances and upon proper application, to a court hearing on the validity and proper amount of the fair share fee. We have concluded, however, that, in the absence of unusual circumstances, the hearing and final judicial determination of the fee's validity may follow the actual withholding of the fair share fee from the employee's paycheck.

Robbinsdale Education Association v. Robbinsdale Federation of Teachers Local 872, 239 N.W.2d 437, 441 (Minn. Sup. Ct. 1976).

The court concluded that the governmental interest in securing the financial stability of the exclusive representatives was sufficiently strong to override the individual's interest in obtaining a prior determination of the fee's validity. However, the court held that the governmental interest in union stability was not so compelling as to bar an injunction against use of the union fees until their validity was determined in a hearing before the state trial court.

The Minnesota Supreme Court held "only that" the procedural requirements of the fair share statute did not

violate the due process clauses of the United States and Minnesota Constitutions. It invited the attention of the legislature to other questions raised by the appeal: ". . . it would not appear that undue delay would be caused if, for example, before the fair share fee was imposed and withheld, the exclusive representative was required to document and submit its calculation of the fee to the director of mediation services or the Public Employees Labor Relations Board. The director or the board could afford interested employees, prior to the actual payroll deduction of the fee, an opportunity to inspect and, if warranted, challenge the validity and amount of the fee. The director or board could then allow, disallow, or modify the proposed fee with a short written statement explaining the action. Such a decisional process might render the imposition of the fee more acceptable to the nonmember employees while also developing a body of precedent to define the proper elements of expense to be included in the fair share fee. Any such procedures, however, are not for the court to impose, but must be left to the sound discretion of the legislature." 239 N.W.2d at 445.

The judgment of the trial court was reversed on the narrow ground that the procedural requirements of the statute (construed by the court to include an immediate right to test the fair share fee in a proceeding in a state trial court) passed constitutional muster. The defendants appealed to the United States Supreme Court which vacated the Minnesota Supreme Court's judgment of reversal and remanded for further consideration in light of amendments to the fair share fee statute enacted by the Minnesota legislature. 429 U.S. 880 (1976). The Minnesota Supreme Court further remanded the case to

the trial court.

In 1976 Minn. St. § 179.65, subd. 2 was amended to read in part:

> * * * All public employees who are not members of the exclusive representative may be required by said representative to contribute a fair share fee for services rendered by the exclusive representative in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues. The exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director, the employer and to a list furnished by the employer of all employees within the unit. A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the director, the public employer, and the exclusive representative, within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. * * *

The trial court noted that it was bound by the earlier decision of the Minnesota Supreme Court and, applying the reasoning of that decision, concluded that "the procedure provided by the legialature with respect to all fair share fee withholdings made after [the amendment of the statute] meets the requirements of procedural due

process as established by the Minnesota Supreme Court in its earlier opinion in this matter." (Unreported opinion of the District Court of the Fourth Judicial District, May 6, 1981.)

On appeal from the trial court's judgment the Minnesota Supreme Court affirmed. It reinstated its earlier opinion. It noted that the amended statute, unlike its predecessor "did provide for advance written notice of the amount of the proposed 'fair share fee assessment' and for a hearing subsequent thereto before any fees deducted are transferred to the union." *Threlkeld v. The Robbinsdale Federation of Teachers, Local 872, AFL-CIO*, 316 N.W.2d 551, 552 (Minn. Sup. Ct. 1982). Again the court emphasized that "the financial stability of exclusive representatives was of such importance as to override the need to determine the 'fair share' fee's validity prior to its imposition." 316 N.W.2d at 552.

This judgment was also appealed to the United States Supreme Court which dismissed for want of a substantial federal question. 103 S.Ct. 24 (1982).

Defendants urge that the Supreme Court's action in dismissing the appeal for lack of a substantial federal question is dispositive of the issues in the present case. They urge correctly that a dismissal of an appeal by the Supreme Court for want of a substantial federal question is an adjudication on the merits. *Colorado Springs Amusements, Ltd. v. Rizzo*, 524 F.2d 571, 575 (3d Cir. 1975), *cert. denied*, 428 U.S. 913 (1976). However, the present case differs in two fundamental respects from *Threlkeld*, and the issues raised by these differences were not before either the Minnesota Supreme Court or the

United States Supreme Court.

In the first place the Minnesota statutes in question permitted fees to be required of non-members for services rendered by the majority representative. The original version of the statute provided that the contribution should not exceed expenses for services rendered in connection with negotiations and administration of grievance procedures. The second version of the statute did not contain such a proviso clause, but it authorized fees only for "services rendered by the exclusive representative." Nowhere in any of the Minnesota trial or Supreme Court decisions was it suggested that the fees could be used even temporarily to pay for the union's political, ideological or lobbying activities.

The New Jersey statute, on the other hand, does permit a fee to be taken from non-members computed in part on the basis of the union's political, ideological and lobbying expenses, subject, as we have seen, to the non-member's theoretical right to recover his pro rata share of such payments through an impossibly burdensome demand and return system.

The fee authorized by the Minnesota legislature was for unquestionably lawful purposes, and the interest of the public in providing for such payments was sufficiently great to override the need to determine the fee's validity prior to is imposition.

On the other hand, the public has no interest whatsoever in facilitating payment of that portion of the fee authorized by the New Jersey legislature which reflects the union's political, ideological and lobbying expenses.

In fact the public interest lies in protecting the non-member's First Amendment right not to further causes with which he disagrees. When it dismissed the appeal in *Threlkeld* the United States Supreme Court did not adjudicate the merits of this issue raised by the New Jersey statute.

The second major distinction between the New Jersey and Minnesota statutes is the procedure established under each to determine the validity of the representation fee.

The Minnesota statute provides for advance written notice of the amount of the fee claimed and a hearing before a state tribunal before payment to the union. The New Jersey statute in reality has no provision for determining the propriety of the fee per se. Instead it has a demand and return system designed to enable a non-member to recover back that portion of the fee used for political and ideological purposes and for impermissible lobbying. The fee is not withheld pending a determination of its appropriateness and the hearings are before the union's tribunal in the first instance and, in the second instance, before an appeals board having union and employer representatives. There is no comparison between the Minnesota and New Jersey hearing procedures. When the United States Supreme Court dismissed the *Threlkeld* appeal it did not adjudicate the issues raised by New Jersey's procedures. The dismissal can be cited for the proposition that a representation fee statute which measures the fee by the services rendered to non-members and which provides for advance written notice of the amount of the proposed fee and for a hearing before a state body subsequent thereto before any

fees are transmitted to the union passes constitutional muster. New Jersey's statute hardly fits that description.

If anything, the various opinions in *Threlkeld* serve to illuminate the constitutional infirmities of the New Jersey representation fee statute.

The equitable considerations other than the merits which should guide the court were considered in *Robinson*, 547 F. Supp. at 1322-1324. I deferred enjoining collection of the representation fees charged to plaintiffs in order to give the parties and the legislatures an opportunity to cure the constitutional defects in the statute. More than eight months have elapsed since the date of the *Robinson* opinion. The good faith efforts of the *Robinson* and *Antonacci* union defendants to create an effective and burdenless demand and return system have not been, and probably could not have been, successful. The CWA's comprehensive system for allocating costs and providing a forum in which non-members can seek to reclaim the portions of their fees used for political, ideological and lobbying purposes does not give the non-member a practical way of recovering those portions of his payments which should not have been taken from him in the first place. No approach was made to the New Jersey legislature seeking curative legislation. The New Jersey legislature has done nothing to modify the statute.

If plaintiffs' important constitutional rights are to be protected, injunctive relief must be granted at this time. Effective 30 days from the date of this opinion the employer defendants in each of these cases will be enjoined from paying and the union defendants in each

of these cases will be enjoined from receiving representation fees on account of any plaintiff who files written notice with his employer and his majority representative that he objects to payment of such fees. The injunction as to any plaintiff shall remain in effect until the plaintiff withdraws his objection or until the statute is amended (i) so as to exclude from the representation fee expenses for political, ideological and lobbying activities (other than lobbying to secure approval or implementation of a collection bargaining agreement) and (ii) so as to include a provision for a hearing before a state tribunal on the validity of any representation fee prior to payment of the fee to the union.

Plaintiffs' attorneys are requested to prepare a form of order in conformity with this opinion.

/s/ DICKINSON R. DEBEVOISE
DICKINSON R. DEBEVOISE
U.S.D.J.

DATED: June 15, 1983.

APPENDIX A-6

Order of the U.S. District Court
For Additional Preliminary Injunctive
Relief and Consolidation in *Robinson/*
Antonacci/Olsen v. State of New Jersey/
CWA, June 30, 1983.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PAUL H. ROBINSON, *et al.*, *Plaintiffs,* v. STATE OF NEW JERSEY, Thomas H. Kean, Governor, *et al.*, *Defendants.*	:	Civil Action No. 82-1118
JOSEPH W. ANTONACCI, *et al.*, *Plaintiffs,* v. STATE OF NEW JERSEY, Thomas H. Kean, Governor, *et al.*, *Defendants.*	:	Civil Action No. 82-1119
ALLEN OLSEN, *et al.*, *Plaintiffs,* v. COMMUNICATIONS WORKERS OF AMERICA (CWA), *et al.*, *Defendants.*	:	Civil Action No. 82-3443
	:	June 30, 1983

ORDER FOR ADDITIONAL PRELIMINARY INJUNCTIVE RELIEF AND CONSOLIDATION

This cause coming on for hearing with notice to all named Defendants, the Court being fully advised of the premises, based upon its findings of fact and conclusions of law as set forth in its opinion of June 15, 1983 which incorporates its prior opinions and orders for initial preliminary relief in the above-entitled actions, IT IS HEREBY ORDERED:

1. [Deleted by the Court]

2. That the plantiffs herein are granted additional preliminary injunctive relief against the employer defendants—Governor of State of New Jersey, President of Rutgers University, Board of Education of Pascack Valley, Board of Education of Edison Township, Board of Education of Ridgewood Public Schools, Board of Education of Ocean Township; against the labor organization defendants—Communications Workers of America (CWA), CWA Locals 1032, 1034, and 1039, American Association of University Professors (AAUP), Rutgers Council of AAUP, National Education Association, New Jersey EA, Pascack Valley Regional EA, Edison Township EA, Ridgewood EA, Township of Ocean EA; and, against the agents employees, attorneys, and all persons in active concert or participation with aforesaid defendants.

3. That the aforesaid defendant employers are enjoined from deducting and paying, and the aforesaid labor organization defendants are enjoined from receiving, any representation fees on account of any plaintiff who files written notice with his employer and his majority representative that he objects to payment of such fees.

4. That this order is effective July 15, 1983 and shall remain in effect pending the determination of these actions or until further order of this Court.

5. That the Court defers consideration of plaintiffs' motions to amend the complaints to make class action allegations in the Antonacci and Robinson cases and, in the encaptioned cases, defers class certification for preliminary injunctive relief of all persons paying representation fees who object to such payments.

6. That the question of attorneys' fees be deferred.

DATED: June 30, 1983

/s/ DICKINSON R. DEBEVOISE

DICKINSON R. DEBEVOISE
U.S.D.J.

APPENDIX A-7

Opinion of the U.S. Court of Appeals for the Third Circuit in *Robinson/Antonacci/Olsen v. State of New Jersey/CWA*, August 6, 1984.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 82-5698, 82-5750, 83-5403, 83-5459
83-5532, 83-5533, 83-5563, 83-5569

PAUL H. ROBINSON, *et al.*,

v.

STATE OF NEW JERSEY, THOMAS H. KEAN, Governor, *et al.*,
(D.C. Civil No. 82-1118)

JOSEPH W. ANTONACCI, *et al.*,

v.

STATE OF NEW JERSEY, Thomas H. Kean, Governor, *et al.*,
(D.C. Civil No. 82-1119)

ALLEN OLSEN, *et al.*,

v.

COMMUNICATIONS WORKERS OF AMERICA (CWA), *et al.*,
(D.C. Civil No. 82-3443)

On Appeal from the United States
District Court for the
District of New Jersey
(C.A. Nos. 82-1118/1119 and 82-3443)

Argued February 27, 1984

Before: ADAMS, SLOVITER, *Circuit Judges*,
and TEITELBAUM, *District Judge*[*]

(Opinion Filed August 6, 1984)

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[*] Hon. Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

ADAMS, *Circuit Judge.*

These consolidated appeals present two important questions posed by the representation fee arrangements created under the New Jersey public employee statute:[1] first, the constitutional permissibility under the First Amendment of the use of mandatory representation fees for lobbying activities by public employee unions; and, second, the extent of due process protections afforded to employees who object to the use of any portion of their fees to further the political and ideological stands of their bargaining representative.

The district court determined that the use of mandatory representation fees for lobbying activities by public employee unions was in conflict with the First Amendment of the United States Constitution and that the various escrow account procedures advanced by the de-

[1] A representation fee denotes the mandatory contribution of a non-union employee to the bargaining representative in his or her workplace. Representation fees, also termed agency fees or a fair share, are assessed to help defray the costs of the union's negotiation and administration of the collective bargaining contract, handling of grievances, and other responsibilities under a collective bargaining agreement. Under typical representation fee or agency fee arrangements, employees may elect to join the union selected by the majority of employees in an appropriate unit or pay a fee for services without agreeing to actual union membership. *See* K. Hanslowe, D. Dunn, & J. Erstling, Union Security in Public Employment: Of Free Riding and Free Association 4 (1978).

The present consolidated appeals were held under advisement by this Court pending the Supreme Court's resolution of several agency fee issues in Ellis v. Railway Clerks, 104 S. Ct. 1883 (1984).

fendant-unions were insufficient to protect the constitutional rights of non-consenting employees. Consequently, the district court enjoined the operation of the representation fee provision of the New Jersey Act and ordered that no fees be deducted from the payrolls of non-consenting employees. For the reasons developed below, we reverse the judgment of the district court, direct that the injunctions be withdrawn, and order that the matter be remanded for further proceedings.

I.

In 1968, the New Jersey Employer-Employee Relations Act granted state public employees the rights to bargain collectively with the state employer. N.J.S.A. 34:13-5.1 *et seq.*[2] A prime purpose of the Act was to promote the state's interest in the settlement of labor disputes and the prevention of work stoppages through negotiations between the state employer and a collective bargaining representative selected by the majority of employees.[3] *See Caldwell-West Caldwell Ed. Assn. v. Caldwell-West Bd. of Ed.*, 180 N.J. Super. 440, 435 A.2d 562, 567 (App. Div. 1981). Under the terms of the Act, a public

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[2] Under the National Labor Relations Act, the regulation of state employee labor relations is left to the individual states. 29 U.S.C. § 152(2) (1982).

[3] The declaration of policy contained in N.J.S.A. 34:13A-2 is premised on similar statements of policy in the NLRA and the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1976). The New Jersey Act provides:

> It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes, both in the private and public sectors; that strikes, lockouts, work stoppages and other forms of employer and employee strife, regardless

employee union can collect dues from those employees who choose to join the union; all other members of a bargaining unit are free not to contribute to the union's expenses in any form. Nevertheless, the Act

> require[s] that a majority representative of public employees which has negotiated a labor agreement covering such employees to represent the interests of *all* employees in the bargaining unit, regardless of organizational membership, without discrimination. Non-members of the majority organization, therefore, enjoy virtually equal benefits and protections without sharing in the costs, incurred by collective negotiations, grievance representation, and other services.

Sponsor's Statement to Assembly Bill No. 688, February 9, 1978, quoted in *Robinson v. State of New Jersey*, 547 F. Supp. 1297, 1301 (D.N.J. 1982). *See* N.J.S.A. 34:13A-5.3 ("majority representative . . . shall be responsible for representing the interest of all such employees").

This "free rider" problem was remedied by legislation

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where the merits of the controversy lie, are forces productive ultimately of economic and public waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such public and private employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent, public and private employer-employee peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this Act is hereby declared as a matter of legislative determination.

in 1980.[4] The New Jersey statute was amended to allow a majority bargaining representative to collect a representation fee from all employees within an appropriate bargaining unit who had not joined the union. N.J.S.A. 34:13A05.59(b) directed that the representation fee

> shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available only to its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.

Under N.J.S.A. 34:13A-5.5(c), unions were empowered to use representation fee funds for

> the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the employer.

Section 5.5(c) also requires that any public employee paying a representation fee

> shall have the right to demand and receive from the majority representative . . . a return of any part of that fee paid by him which represents the employee's additional pro rata share of expenditures by the majority representative that is either in aid of activities or causes of a partisan political or ideological

[4] N.J.P.L. 1979, c. 477, eff. July 1, 1980, N.J.S.A. 34:13A-5.5 to 5.9

> nature only incidentally related to the terms and conditions of employment or applied to the cost of any other benefits available only to members of the majority representative.

Public employee unions are not allowed to avail themselves of a dues checkoff (the automatic deduction of representation fees from an employee's paycheck by the employer), until they have established the demand and return system required by statute. N.J.S.A. 34:13A-5.5(c). Such a demand and return system must allow for review of the amount returned "through full and fair proceedings placing the burden of proof on the majority representative." N.J.S.A. 34:13A-5.6. Employees dissatisfied with the review proceeding have a right of appeal to a three-member board consisting of a representative of public employers, a representative of public employee organizations, and a neutral member. Further appeals from this board lie to the state courts.

II.

The consolidated appeals before the Court today involve three separate challenges to the constitutionality of the 1980 amendments brought by individual faculty members at the state-owned and operated Rutgers University, individual teachers employed by five different school boards in New Jersey, and individual employees of the state.[5] The defendants are the State of New Jersey,

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[5] Plaintiffs in each case moved for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Class certification was denied by the district court and plaintiffs appeal from this denial. Because we rule that plaintiffs are not entitled to relief under the Constitution in the consolidated appeals, we need not reach the issue of class certification.

its governor, the state public employment relations commission (PERC), and various national and regional affiliates of public employee unions.

In *Robinson v. New Jersey*, plaintiffs attack the representative fee paid by all faculty members at Rutgers University to the American Association of University Professors (AAUP). In *Westfield Education Association v. Antonacci*, the challenged majority representative is the National Education Association (NEA) and its New Jersey affiliates. In *Olson v. Communications Workers of America*, the disputed representation fees are paid to the Communications Workers of America (CWA) as bargaining representative for four units of state employees.

Although the original actions filed in the district court challenged a broad swath of the New Jersey statute, including the authority of the state legislature to require non-consenting employees to pay representation fees, the consolidated appeals focus primarily on the authorization of lobbying by public employee unions and the demand and return systems established by the unions involved in the present appeal. In a joint opinion covering the *Robinson* and *Antonacci* cases, the district court held that "it is permissible to require non-members to contribute to the cost of collective bargaining activities." 547 F. Supp. at 1316. The court, however, found that the New Jersey statute went beyond what was constitutionally permissible in allowing the use of representation fees for lobbying activities "designed to foster policy goals in collective negotiations and contract administration." N.J.S.A. 34:13A-5.5. Pointing to the possibility of "very deep political and ideological differences of

opinion" regarding the aims of such lobbying, the court concluded:

> Although plaintiffs are teachers and defendants can argue that they might benefit personally from changes in these laws, plaintiffs and other non-members of the employee organizations may nevertheless oppose such legislative changes. They may oppose for political or ideological reasons; they may believe, as do many other citizens, that the legislative changes sought by the employee organizations are bad public policy even though they, as teachers, might receive certain benefits.
>
> . . . New Jersey's statute does permit such lobbying, and to that extent it violates plaintiffs' First Amendment rights.

547 F. Supp. at 1317. The district judge entered an injunction prohibiting the unions from using any agency fees in lobbying efforts. The judge also directed that all representation fees be placed in escrow under the supervision of the court until such time as the unions devised a procedure under which the unions, rather than a challenging employee, would have the entire burden of proving that representation fees were not directed toward constitutionally impermissible ends.[6]

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[6] Following the district court's ruling on September 28, 1982, the union-defendants appealed the district court's determination that representation fee proceeds could not be directed toward collective-bargaining related lobbying. Plaintiffs cross-appealed on the refusal of the district court to enjoin the collection of all representation fees in light of the ruling that the New Jersey statute was constitutionally infirm. The court denied the request for broader injunctive relief for fear this might "injure the collective bargaining process." 547 F. Supp. at 1324. Because of our disposition of the merits of this case, we need not reach the issue presented on cross-appeal whether the failure of the district

In March 1983, the district court extended the injunction against the use of representation fees to the CWA locals involved in the *Olsen* suit. Because the CWA had already established a practice of escrowing 40 per cent of the fees during the pendency of the litigation, the district judge did not grant preliminary injunctive relief against the union's collection mechanism. Rather, he consolidated the three proceedings for final determination of the constitutionality of the various demand and return systems.

On June 15, 1983, the district court entered its injunction against the employment of any of the demand and return systems designed by the three defendant unions. The court acknowledged that the CWA system in particular "constituted genuine attempts to create as effective demand and return systems as human ingenuity could devise." 565 F. Supp. at 945. The judge, however, concluded:

> [E]ach system is complex and overwhelmingly burdensome. Each requires an objecting member to expend such major efforts to pursue his remedy that no individual could be expected to avail himself of the remedy. Thus under the very best demand and return system no objecting non-member can devote the time and money required to ascertain and, if warranted, regain the portion of his representation fee which the union may use for political and ideological purposes. The statutory requirement of a demand and return system is an illusory remedy.

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court to enjoin the collection of all representation fees in 1982 was an abuse of discretion. We also do not reach the question whether the court's sub sequent injunction against all representation fee payments mooted the cross-appeal from the 1982 ruling.

> As a practical matter, therefore, the statute permits a union to take the funds of objecting nonmembers and use them for the union's own political and ideological purposes. The good faith efforts of the union defendants in these cases to create workable systems demonstrate that no demand and return system can protect an objecting non-member's First Amendment rights.

Id. at 945-46. The court then issued final injunctive relief to the plaintiffs prohibiting the collection of any representation fees from objecting employees:

> If plaintiffs' important constitutional rights are to be protected, injunctive relief must be granted at this time. . . . The injunction as to any plaintiff shall remain in effect until the plaintiff withdraws his objection or until the statute is amended (i) so as to exclude from the representation fee expenses for political, ideological and lobbying activities (other than lobbying to secure approval or implementation of a collective bargaining agreement) and (ii) so as to include a provision for a hearing before a state tribunal on the validity of any representation fee prior to payment of the fee to the union.

Id. at 949.

III.

We begin our analysis by addressing the first of the constitutional challenges to the New Jersey representation fee system, the claim that the lobbying provision infringes the First Amendment rights of non-consenting employees.

A.

Before we turn to the issues posed by the lobbying activities of public employee unions, it bears emphasis that the constitutional dimension of compelled employee support for these activities does not arise in a vacuum. All compulsory contributions to unions, whether in the form of the closed or union shop or in the form of representation or agency fees, to some extent implicate the rights of association and free expression protected by the First Amendment. As the Supreme Court has recognized,

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of idea, or to refrain from doing so, as he sees fit.

Abood v. Detroit Board of Education, 431 U.S. 209, 222 (1977).

To recognize the constitutional ramifications of compulsory contributions to unions, however, does no more than set the stage for the judicial inquiry. A constitutional analysis under the First Amendment must also consider the rights of the majority employees to association for the purposes of advancing their interests, *International Association of Machinists v. Street*, 367 U.S. 740, 773 (1960), and of the congressional determination that collective bargaining best promotes industrial peace. Thus, in *Abood*, the Court reiterated that "such interference [with individual First Amendment rights] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. As one commentator has observed:

> [T]he most effective technique to produce acceptable terms to resolve disputes is voluntary agreement of the parties, and the best system we have for producing agreement between groups is collective bargaining . . . .

Kheel, *Strikes and Public Employment*, 67 *Mich. L. Rev.* 931, 942(1969).

The Supreme Court first confronted the First Amendment issues in the union shop context in a series of cases brought under the Railway Labor Act. In *Railway Employees Dept. v. Hanson*, 351 U.S. 225, 231 (1956), the Court took note of Congress' intent that those "who

enjoy the fruits and benefits of unions" should contribute to the cost of collective bargaining, and that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments." *Id.* at 238.

Beginning with *Street*, however, the Court recognized that certain categories of union expenditures could not properly be taxed against non-consenting employees. Thus, while the Railway Labor Act did not curtail "the traditional political activities of the railroad unions," unions could "not support those activities, against the expressed wishes of a dissenting employee, with his exacted money," even in a closed shop. 367 U.S. at 770. The Court concluded that the employees "who have participated in this action have in the course of it made known to their respective unions their objection to the use of their money for the support of political causes. In that circumstance, the respective unions were without power to use payments thereafter tendered by them for such political causes," *Id.* at 771.[7]

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[7] *But see Street, supra*, 367 U.S. at 800-804, 812(Frankfurter, J., dissenting)(challenging majority's reading of legisla tive history to bar traditional union use of funds to promote political interests of labor). The distinction drawn in *Street* between general union activities that could be charged to compulsory union fees and political activities that could not has been challenged as unworkable and as having such minimal consequences on any individual employee as to be without constitutional significance. Cantor, Uses and Abuses of the Agency Shop, 49 Notre Dame L. Rev. 62, 70-71 (1983):

> Forced payments to a service organization by all who benefit from the service do not significantly impinge on associational or speech interests, even if the beneficiary organization uses a

In *Railway Clerks v. Allen*, 373 U.S. 113 (1963), the Court returned to the question of what funds could not be taxed against non-consenting employees and the remedies that would protect First Amendment rights of these employees. Relying on the Railway Labor Act, the Court distinguished "the union's political expenditures from those germane to collective bargaining, since only the former, to the extent made from exacted funds of dissenters, are not authorized by [the Act]." *Id.* at 121. Although the holding rested on a statutory interpretation, the Court intimated that so long as mandatory contributions were used to further activities "germane to collective bargaining," the demands of the First Amendment would be met. The Court suggested that any constitutional deficiencies could be cured by a proportional refund to objecting employees of any funds expended in furtherance of the union's political agenda. *Id.* at 122-23.

The case law developed under the Railway Labor Act

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portion of the extracted fees to support political or ideological causes opposed by some payors. So long as the organization does in fact perform a useful function for the fees payors, and so long as the organization is legally bound to use the funds to promote the related functions and goals of the organization, then the disgruntled fees payor cannot complain any more than the taxpayer whose funds are used by the government for programs ideologically offensive to the taxpayor. [Footnotes omitted]

See also Cantor, Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association, 36 Rutgers Law Review 3(1983-84.) There would appear to be a certain irony in the greater scrutiny imposed on union expenditures as a result of the state action nexus than is imposed on actions of the government itself. Cf. United States v. Lee, 455 U.S. 252 (1982) (upholding constitutionality of requirement that Amish pay social security taxes despite religious objection).

was first applied to public employees in *Abood*. Pursuant to Michigan law, the Detroit Federation of Teachers signed a collective bargaining agreement with the Board of Education that provided for an agency fee shop. D. Louis Abood and other teachers filed suit in state court challenging the authorizing legislation as abridging both state and federal constitutional protections. The Supreme Court upheld the state statute as a permissible exercise of the state's power to regulate labor relations matters: "[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller." 431 U.S. at 224. Applying the trilogy of cases decided under the Railway Act, the Court concluded:

> The very real differences between exclusive agent collective bargaining in the public and private sectors are not such as to work any significant infringement upon the First Amendment interests of public employees. A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint.

Id. at 230. Simply put, "[t]he differences between public- and private-sector collective bargaining do not translate into differences in First Amendment rights." *Id.* at 232.

Having determined the constitutional validity of an agency fee shop in the public sector, the Court narrowed the issue to one of fashioning a guarantee that no employee shall be forced to subsidize the political or ideological positions of a union:

> There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for

> which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. The Court held in *Street* as a matter of statutory construction, that a similar line must be drawn under the Railway Labor Act, but in the public sector the line may be somewhat hazier. The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process. We have no occasion in this case, however, to try to define such a dividing line.

Id. at 236 (footnote omitted).

It is this task of line drawing we now address.

B.

This past term, the Supreme Court reaffirmed the "germane to collective bargaining" standard for judging the use of mandatory fees over an employee's objection:

> [T]he test must be whether the challenged expeditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.

Ellis v. Railway Clerks, 102 S. Ct. 1883, 1892 (1984). Applied to the issue of lobbying, two possible analytic frameworks are advanced by the litigants. First, we

could decide, as plaintiffs urge, that the union may tax representation fee payers only for contract negotiations that occur exclusively at the bargaining table. Second, we could distinguish between union expenditures based upon the subject matter of the expenditure, rather than the forum.

1.

There is nothing in the case law governing public employee unionism that mandates the conclusion drawn by the plaintiffs. *Abood* itself recognizes that "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table." 431 U.S. at 236. Similarly, in a case brought under the NLRA, the Supreme Court defined the statutory "mutual aid or protection" clause under the NLRA to extend to activities in which employees "seek to improve working conditions through resort to administrative and judicial forums" and added that "employees' appeals to legislators to protect their interests as employees are within the scope of this clause," *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566-57 (1978) (footnote omitted). *See also id.* at 565 n.13 (reviewing policy considerations underpinning legislative decision to allow employees to act collectively with regard to terms and conditions of employment and "the welfare of labor generally"). Taken as a whole, the agency fee case law points to a focus on collective bargaining as a process whereby unions must advance the collective interests of their members in a number of arenas. We are therefore unable to conclude under the First Amendment that New Jersey cannot extend the same scope of bargaining powers to public employee unions under state statute as has

been created by Congress under the NLRA.

To decide otherwise would seriously hamper the ability of public employee unions to bargain effectively for the employees they represent. Public employee bargaining is distinctive in that at least a portion of a union's attention is directed away from the bargaining table, even for what would be designated the standard terms and conditions of employment under the NLRA:

> [I]n the private sector, the employer must send someone to the bargaining table with authority to make a binding agreement. In the public sector this may not be legally possible or politically sensible. Wages and other benefits directly affect the budget and the tax rates; but adopting budgets and levying taxes are considered, within our governmental system, fundamental legislative policies to be decided by the legislative body, not by a negotiator at the bargaining table. Dismissal procedures may be subject to constitutional requirements which limit the procedures which can be negotiated. Promotion policies may be governed by civil service principles which are written into the city charter and cannot be eliminated by bargaining. Modifications in state pension plans cannot, in most states, be made binding by negotiators, but must be ratified by the legislature. In the public sector, agreement at the bargaining table may be only an intermediate, not a final, step in the decisionmaking process.

Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. of Cin. L. Rev. 669, 670-71 (1975).[5]

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[5] It is possible to question whether meaningful bargaining can even

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These appeals do not represent the first time that a court has been asked to evaluate the underlying constitutional implications of mandatory contributions to unions. In *Abood* the teacher-plaintiffs contended that the bargaining activity of a public sector union is inherently political and that compulsory financial support of such activity therefore transgresses First Amendment associational rights. This argument was rejected in *Abood* and

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potentially occur at the bargaining table in the public employment context:

> Collective bargaining in state and local govern ment typically takes place in two steps. First, the employee organization hammers out an agreement with an administrator. Second, they take their agreement to the appropriate legislative body for validation of its economic portions. Occasionally, they lobby jointly for validation. More often, the employee organization "renegotiates" for better terms at the legislative level by partisan lobbying.
>
> The ideal arrangement would centralize management bargaining authority in a single person or administrative body, but legislatures seem to hate giving up power, particularly over the purse-strings; hence the governmental structure tends to encourage the two-step procedure. This discourages meaningful bargaining at the first step.

E. Beal, E. Wickersham & P. Kienast, The *Practice of Collective Bargaining* 499 (1976). *See generally, id.* at 456-57 (traditional recourse to lobbying by public employee unions); Hildebrand, *The Public Sector* in J. Dunlop & N. Chamberlain, eds., *Frontiers of Collective Bargaining* 129 (1967) (legislative body is ultimate authority for committing a public agency to a collective bargain); M. Lieberman, *Public Sector Bargaining* 116-121 (1980) (overlap between bargaining over terms and conditions of employment in public sector and statutory regulation of employment; lack of certainty in many jurisdictions over which prevails); H. Wellington & R. Winter, *The Unions and the Cities* 137-153 (1971) (problems of scope of bargaining in public sector).

again in *Minnesota State Board for Community Colleges v. Knight*, 104 S. Ct. 1058(1984). In the latter case, the Court held that, although an agency fee arrangement could bolster the political position of a public employee union, the pressure to support the majority representative's political positions "is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom." The Court left untouched the reasoning of the three-judge district court in *Knight*, 111 LRRM 3156, 3169 (D. Minn. 1982)[9] that, based upon *Abood*, the "crucial distinction is union political activity *unrelated* to collective bargaining." *Id.* (emphasis in original).

This Court has also previously discussed the scope of *Abood's* restriction on the forcible underwriting of political and ideological concerns. In a case involving the use of student fees at a state university for purely political lobbying activities, we distinguished *Abood* as restricting only "that portion of the union service fee used for political or ideological purposes *unrelated* to collective bargaining. . . . [T]o the extent the service fee was used for *purely* political purposes, it could be extracted only from those employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Galda v. Bloustein*, 686 F.2d 159, 164 (3d Cir. 1982) (emphasis added).

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[9] The opinion of the three-judge court upheld a Minnesota fair share statute which provided for agency fees to be paid by all state university professors to the Minnesota Community College Faculty Association. This decision was affirmed by the Supreme Court without opinion. 103 S. Ct. 1493 (1983). The district court's subsequent injunction modifying the election procedures for faculty representatives was reversed. 104 S. Ct. 1058 (1984).

For New Jersey public employees, collective bargaining is inextricably intertwined with legislative change. An examination of the mechanics of New Jersey's public employee collective bargaining agreements reveals to what extent the standard terms and conditions of employment under the NLRA or the RLA are governed by state statute or regulation. *Cf. Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964); R. Gorman, *Basic Text on Labor Law* 496-523 (1976) (review of mandatory subjects of bargaining under NLRA). For example, an affidavit submitted by M. Don Sanchez, the New Jersey Area Director of the CWA, in the *Olsen* proceeding, listed no fewer than fifteen traditional subjects of bargaining that are governed by New Jersey statutes, civil service rules, administrative regulations, or executive orders. Among these are pensions, overtime, subcontracting, employee transfers, safety and health, medical plans. App. at 101-15.[10]

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[10] By way of example, Mr. Sanchez recounts:

> [O]ne of the fundamental responsibilities of the Union is to protect unit members from arbitrary and capricious disciplinary actions by an employer. Consequently, every collective bargaining agreement that I have helped to negotiate in the private sector contained a disciplinary grievance procedure terminating in binding arbitration. . . . However, a Court decision (State v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981)) declared the imposition of disciplinary sanctions to be non-negotiable and non-arbitrable. . . . Shortly after this Court decision was handed down, legislation was introduced to permit binding arbitration for discipline. . . . Given the importance to our unit members of an impartial and indepedent review of disciplinary action, CWA actively supported [the proposed bill] and related measures, designed to reinstate the right to arbitrate discipline. This support assumed the form of testifying before the Senate Government Committee, speaking with and writing to various legislators, and asking our unit members to support this legislation.

App. at 106-108.

Since many of the essential terms and conditions of employment that are mandatory subjects of bargaining under Sections 8(d) and 9(a) of the NLRA are governed by state authorities in the public employment context, a public employee union unable to lobby the state authority would be severely handicapped in performing its duties as a bargaining representative.

As the Supreme Court noted in *Ellis*,

> objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

104 S. Ct. at 1892. We do not read the legislative history of the New Jersey Act to seek the creation of ineffectual public employee unions, nor do we find any constitutional prohibition against the fulfillment of the legislative goal of promoting labor peace by permitting the enumerated activities of public employee unions.

So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication than any other form of union activity that may be financed with representation fees. The district court's contrary conclusion—that the New Jersey Act is facially unconstitutional insofar as it permits lobbying by public employee unions—must therefore be

reversed. Under N.J.S.A. 34:13A-5.5, a union is allowed to charge against representation fees the "costs of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer." Without prejudice to any future challenge to lobbying acts beyond the statutory authorization, we hold that the statute on its face is a legitimate means of achieving the state interest in labor peace and does not unnecessarily burden the First Amendment rights of representation fee payers.

C.

The recent decision in *Ellis* does not depart from the governing case law developed in the Railway Act trilogy and *Abood*. In *Ellis*, the Supreme Court entertained challenges under the Constitution and the RLA to the use of agency fees to support six categories of union expenditures: conventions, social activities, publications, organizing, litigation, and death benefits. The Court held that, under the RLA, non-consenting agency fee payers could not be charged for organizing expenses or the costs of reporting activities that were themselves not properly taxable against fees. Examining the remaining categories under the Constitution,[11] the Court found no constitutional infirmity to the use of agency fees to support traditional union activities:

> [B]y allowing the union shop at all, we have already

[11] Because the union in question had been decertified during the pendency of the appeal, the Supreme Court did not reach the constitutionality of the use of agency fees for death benefits.

> countenanced a significant infringement on First Amendment rights. . . . It has long been held that such interference with First Amendment rights is justified by the governmental interest in industrial peace. . . . Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint.

104 S. Ct. at 1896.

The Court's discussion of the First Amendment implications of the use of agency fees for publications and conventions is directly apposite to the present case. *Ellis* acknowledges that the use of compelled contributions to finance expressive activity (as is also the case with lobbying) comes closest to the First Amendment protection of communicative content and the free expression of ideas. However, the Court concluded,

> [W]e perceive little additional infringement of First Amendment rights beyond that already accepted, and one that is not justified by the governmental interest behind the union shop itself. . . . The very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds. . . . These expenses are well within the acceptable range.

Id.

Thus, *Ellis* confirms the basic tenet of the RLA trilogy and *Abood*: the First Amendment is not an insuperable obstacle to the effective representation of a bargaining unit by a union, either in the private or public sectors.

Unions advancing the collective interests of the employees they represent need not shoulder the financial burden of non-members simply because effective representation necessarily includes taking positions on the issues affecting the membership. To conclude otherwise would diminish the expressive rights of the majority of employees whose full union contributions would be depleted to cover the costs incurred in the representation of free riders. Such a result is not required by the First Amendment.

IV.

The second issue pressed on appeal is the constitutionality of the demand and return systems authorized by state statute and implemented by the defendant-unions. The district court's injunction against the operation of the demand and return systems was premised on two distinct constitutional rulings. First, the court held that even optimal demand and return systems violate the First Amendment rights of employees wishing to contribute the withheld monies to alternative political causes of their choosing. Second, the court determined that the procedures for the return of withheld funds in this situation were unwieldy and burdensome and therefore violated the Fifth Amendment's protection of due process.

A.

The district court concluded that "no demand and return system can protect an objecting non-member's First Amendment rights." 565 F. Supp. at 946. The locus of the deprivation of First Amendment rights, according to the district judge, is the withholding of

funds that the employee might wish to bestow upon an alternative political view and the involuntary loan a non-consenting employee may be forced to grant to a majority bargaining representative. Thus we must determine not whether one or another system of public employee representation is advisable as a matter of public policy—a task uniquely suited to the legislature—but whether the demand and return systems authorized by the New Jersey statute unconstitutionally infringe the First Amendment and due process rights of non-consenting employees.

Turning first to the constitutional significance of the temporary deprivation of funds from an empoyee's personal political use, we are cautioned by *Abood* that "[a] public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint." 431 U.S. at 230. Where the obstacle to free expression is the temporary deprivation of money, rather than a prohibition of access to a forum, the Supreme Court has allowed far greater leeway to challenged state procedures. In *Buckley v. Valeo*, 424 U.S. 1 (1976), for example, limitations on individual contributions to political campaigns were examined under a lesser standard of scrutiny than restrictions on the expenditures of the political campaign itself. *Buckley* held that ceilings on contributions entail "only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20-21. Similarly, a temporary loss of funds does not have the same impact on constitutionally protected speech that the denial of a forum or the forcible contribution to a political cause against one's will would have. *See Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) (First Amendment harm remote in

context of bar association dues supporting American Bar Association political positions); *Hamilton v. Regents*, 293 U.S. 245, 265 (1934) (First Amendment harm is remote when money is all that is involved). *Cf. Buckley v. Valeo* (compelling governmental interest in fair elections may be furthered by use of matching funds despite some impact of money on First Amendment concerns); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (lesser First Amendment concern where state action is content neutral, there is no likelihood of confusion between speaker and state, and an individual is free to disavow statements disagreed with).

Even assuming some cognizable harm occasioned by the temporary deprivation of a small amount of returnable fees, adequate post-deprivation procedures may suffice to withstand the constitutional challenge. The district court's final injunctive order is premised on its determination that any remedies after a deprivation of property in violation of the First Amendment right to contribute free of state interference would necessarily be constitutionally inadequate. However, an emerging line of case law has undermined the premise that post-deprivation remedies cannot protect what might otherwise be an unconstitutional taking. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court sanctioned the discontinuation of disability benefits prior to a full evidentiary hearing. The Court reasoned that the notice provisions of the challenged social security termination procedure combined with the "fairness and reliability of the pre-termination procedures," 424 U.S. at 343, rendered the likelihood of harm remote and the extent of actual harm, were it to occur, *de minimus*. *See also Board of Curators v. Horowitz*, 435 U.S. 78 (1978)

(dismissal of medical student prior to full evidentiary hearing permissible); *Dixon v. Love*, 431 U.S. 105 (1977) (summary revocation of drivers license); *Ingraham v. Wright*, 430 U.S. 651 (1977) (on-the-spot corporal punishment permissible, even with sole remedy that of state law tort action); *Baksalary v. Smith*, 579 F. Supp. 218, 235 (1984) (Adams, J., concurring) (*Mathews* standard of reliability requires notice and adequacy of post-deprivation procedures).

Based upon *Mathews* and its progeny, we conclude that the constitutional infirmity of the demand and return systems, if any, depends on the adequacy of the return arrangements. We hold that, standing alone, the deprivation of the non-consenting employee's ability to contribute the withheld funds to an alternative political view does not constitute a First Amendment violation. Rather, the question is one of the due process protections in the assessment of the withholding and the adequacy of the post-withholding return systems.

B.

Under *Ellis*, the First Amendment interest of an objecting employee is narrowly defined: no employee may be forced to grant the majority representative "an involuntary loan for purposes to which the employee objects." 104 S. Ct. at 1890. This constitutional interest of an individual employee is not adequately protected by what the Supreme Court termed "a pure rebate system, under which the union would have unrestricted use of the objecting employee's funds until such time as repayment is made. It was the absence of any advance reduction, combined with the lack of a compelling state inter-

est in ancillary campus political activities, that occasioned this Court's ruling in *Galda*. In the union context, however, where the Supreme Court has recognized the compelling governmental interest in labor peace, the constitutional issue is the establishment of a system that would protect against the involuntary subsidization of union political and ideological expenditures without unduly burdening legitimate union functioning. Thus, in *Ellis*, the Court approved as satisfying the First Amendment either an advance reduction of dues or the placing of contested funds in an interest-bearing escrow account. 104 S. Ct. at 1890.

The challenged representation fees in the present litigation incorporate both of the protective mechanisms approved by *Ellis*. By statute, there is a fifteen percent differential between the amounts chargeable to fee payers and the union dues of full union members; the ceiling on fees to the former is set at 85 percent of the dues of the latter. In addition, each of the defendant-unions has created an escrow system for a portion of the representation fee. In order for the representation fees collected by the unions to be susceptible to constitutional challenge, therefore, the expenditures for political and ideological activities by them must exceed the sum of the fifteen percent statutory "cushion" and the amount escrowed by the union.[12]

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[12] The dissent would read *Ellis* to require that the statute on its face preclude any possibility of forced loans to unions in order to survive constitutional scrutiny. By its own terms, *Ellis* allows for two "acceptable alternatives" that would protect the rights of dissenting employees: an advance reduction of dues and/or interest bearing escrow accounts. 104 S. Ct. at 1890. The statute on its face satisfies one of these two "acceptable alternatives." All representation fee payers are, without request, given a fifteen percent advance reduction from the dues charged

The district judge concluded that *any* withholding would violate the Constitution and, accordingly, made no findings of fact concerning the protections against unauthorized union expenditures contained within each of the demand and return systems:

> Nothing was done after I entered the order in *Robinson* and *Antonacci* either by the defendants in those cases or by the New Jersey legislature to seek to cure or to cure the constitutional defects in the representation fee statute. The union defendants devised and prepared to implement new demand and return systems. The new systems contemplate escrowing a sufficient portion of each objecting non-member's representation fee to ensure that no part of the fee would be spent for political, ideological or improper lobbying purposes prior to exhaustion of the union and state demand and return procedures. The new systems also contemplate the creation of revised union demand and return procedures whereby the unions would be required to establish before outside, independent arbiters the correctness of their fees and the absence of improper expenditures from such fees. Further, the *Robinson* and *Antonacci*

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to union members. This protection is all that *Ellis* mandates. Thus there is no occasion in this appeal for this Court to attempt to conjure up an unconstitutional application of the representation fee provision. As the Supreme Court noted in *Ellis*, "[w]hen the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty." 104 S. Ct. at 1890.

Although the dissent characterizes the challenged New Jersey representation fees as "not substantially different" from those reviewed by the Supreme Court in *Ellis*, the presence of both advanced reductions and the escrow system calls this characterization into question.

> union defendants take the position that any objecting non-member may skip the union's demand and return system and proceed directly to the State board of appeals.
>
> These attempts by the *Robinson* and *Antonacci* unions to create effective demand and return systems and the demand and return system established by CWA represent good faith attempts to devise systems which can impartially and accurately determine what portion of a non-member's representation fee is used for contract negotiation, contract administration and processing grievances and what portion is used for other purposes. Sincere and conscientious as these efforts have been, however, they do not avoid or cure the basic constitutional defects in the New Jersey statute.

565 F. Supp. at 944-45. This determination by the district court is at variance with *Ellis*.[13]

An examination of the demand and return systems adopted by the defendant unions reveals that the principal protections required by *Ellis* and the *Mathews* due process case law are already in existence. The system employed by the NEA locals is automatically triggered by the filing of an objection letter with the local union.

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[13] The district court's conclusion that "no demand and return system can protect an objecting non-member's First Amendment rights" is, in the dissent's view, a finding of fact which should be accorded due deference. Although we agree that district court findings of fact ordinarily are entitled to considerable deference, we read the district court's categorical rejection of all demand and return systems, regardless of advance rebates or interest-bearing escrow provisions, to be a ruling of law and consequently subject to plenary review by this Court.

The amount immediately escrowed is equal to five per cent over what an independent auditor determines was the amount spent the previous year on non-compulsory representation matters. Arbitration of the disposition of escrowed funds takes place once each year by a member of the National Academy of Arbitrators. The arbitrator determines the amount of dues income expended on collective bargaining (this is computed state-wide for a large union like the NEA and then apportioned to the local—the district court found that this was to the advantage of the employees since the locals were less likely to engage in lobbying or political activity, 547 F. Supp. at 1324). Throughout the entire procedure, the burden of proof rests with the union. All fee payers receive yearly notice of the right to receive a refund.

The AAUP system incorporates many of the features of the NEA arrangement, save that it grants an "advance rebate" equal to a pro rata share for anticipated non-compellable expenses for the remainder of the fiscal year. It also provides for year-end adjustments of the rebate following an auditors report. The AAUP system provides each member at the end of the fiscal year with (1) a financial audit and report for the previous year, (2) the approved budget for the previous year, (3) the budget for the current year, and (4) statement that all current expenses are within the projected budget. Evidence was introduced that the AAUP engages in no partisan political activity and that less than five per cent of its budget is expended on lobbying or matters not directly related to terms and conditions of employment. Despite the minimal amount spent on potentially objectionable activities, the AAUP has further represented to this Court that its Rutgers University chapter now escrows 100 per

cent of the representation fee deducted upon receipt of an objection letter in order to reduce the administrative burdens of the escrow system.

The CWA has formulated the most sophisticated demand and return system of any of the unions involved in this appeal. The national union retains independent auditors to go through the national budget and to break down all expenditures into general categories such as organizing, administrative, and lobbying. These categories are then sub-divided by category into retainable and non-retainable portions under demand and return systems. This procedure is then repeated at the local level. Upon the filing of an objection letter with the local union, the CWA automatically places into escrow 40 per cent of the agency fee received from a public employee. Since in New Jersey this is based on a representation fee that is only 85 per cent of the dues paid by a union member, the CWA has access to only 51 per cent of what a union member would pay in the case of each objecting non-union employee. The CWA introduced evidence to show that based upon its elaborate accounting procedures, which were not challenged in the district court, it was ascertained that the New Jersey locals spent between 15.01 per cent and 23.76 per cent of their budgets on arguably non-collective bargaining issues.[14] Thus the "deprivation" suffered by any employee whose funds were escrowed would be between 0.01 per cent and

[14] These calculations included all lobbying activity engaged in by the local unions in question. Under our holding in section III of this opinion, much of this lobbying activity, if not all of it, should be computed as a per cent of the annual budget spent on matters related to collective bargaining issues. It would appear that such a recalculation would bring at least some of these locals under the fifteen per cent statutory cushion even without the escrow provision.

8.76 per cent of the allowable representation fee. The union also calculated that the monetary value of this "harm" would be between $0.02 and $18.00 per year, depending on the local involved.

On remand, the district judge should examine these systems to determine whether the escrow procedures satisfy the *Ellis* requirement that the unions not be in a position to extract a forced loan from non-consenting employees.[15]

V.

The defendant-unions claim that even assuming the district court's ruling on the constitutionality of the lobbying provisions to have been correct, the injunctive relief granted plaintiffs was an abuse of discretion. Although the district court's ruling on the constitutionality of the New Jersey statute will be reversed, the propriety of the injunctive relief is nonetheless still before us. We must determine whether it is appropriate to continue

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[15] The district court erroneously enjoined the operation of the agency fee statute until a provision was enacted allowing for a hearing before a state tribunal of any representation fee prior to payment of the fee to the union. 565 F. Supp. at 949. Such an injunction appears to be premised on a heightened evidentiary threshold for the withholding of any funds because of the constitutional impact the trial court found the withholding to have upon non-consenting employees. In *Ellis*, the Supreme Court held that "no heightened standard is appropriate" in judging the propriety of the withheld funds and that there is "no need to abandon the preponderance of the evidence standard normally applicable in civil suits for damages." 104 S. Ct. at 1897 n.15 (1984) (citing Addington v. Texas, 441 U.S. 418, 423 (1979) (in cases involving a monetary dispute between two private parties, society has a minimal concern with the outcome and, there fore, "plaintiff's burden of proof is a mere preponderance of the evidence")).

the injunctions during the remand to the district court for a determination of the constitutional adequacy of the demand and return systems.

It must be noted that the district court injunctions effectively deprive the unions *in toto* of the statutorily allocated representation fees. Given the small amount of funds lost from any given employee and the costs involved in litigation to recover these lost fees, it is unlikely that any action for recovery will follow. The injunctive relief, therefore, has forced union members to underwrite the lobbying efforts of the union for the terms and conditions of employment of all employees, agency fee payers included. Thus, the effect of the injunctive relief has been to permit the free rider problem which the Supreme Court addressed in *Abood* to manifest itself under the aegis of the court's injunction.

On three separate occasions the Supreme Court has declared that injunctive relief is not the proper judicial response to potential statutory or constitutional violations created by a union's use of mandatory fees. In *Street*, after holding that mandatory union dues could not be used to fund political causes, the Court remanded the case with instructions that "a blanket injunction against all expenditures of funds for the disputed purposes, even one conditioned on cessation of improper purposes, would not be a proper exercise of equitable discretion." 367 U.S. at 772. Similarly, in *Allen*, the Court declared that it was impermissible to order "an injunction relieving dissenting employees of all obligation to pay the moneys due . . . ." 373 U.S. at 119.[16] The

[16] The Court in *Allen* further cautioned, "no decree would be proper

refusal of the Michigan Court of Appeals to grant injunctive relief was likewise upheld by *Abood*. 431 U.S. at 240-42.

The case law reflects a fundamental congressional policy against the enjoining of activities of labor unions. Under the Norris-LaGuardia Act, 29 U.S.C. §§" 101-115 (1982), Congress severely limited the availability of temporary or permanent injunctive relief in cases involving or growing out of a labor dispute. *See Street*, 367 U.S. at 772. In *Street*, the Court applied the policy concerns of the Act to suggest that courts "should hesitate to fix upon the injunctive remedy" when many of the challenged expenditures are "made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the union on them." 367 U.S. at 773. The Court added, "the fact that these expenditures are made for political activities is an additional reason for reluctance to impose such an injunctive remedy." *Id.*

Moreover, the record in these consolidated appeals does not present the factual predicate for the grant of injunctive relief. One of the requirements for an injunction against a state statute is a showing that the continued operation of a statute will result in irreparable harm to the plaintiffs. *See Continental Group, Inc. v. Amoco Chemical Corp.*, 614 F.2d 351, 356 (3d Cir. 1980); *Constructors Association of Western Pennsylvania*

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which appeared likely to infringe the union's right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend non-dissenters such exactions in support of political activities." 373 U.S. at 122.

v. Kreps, 573 F.2d 811, 814-15 (3d Cir. 1978). Necessarily, such a showing requires evidence of at least *some* harm. Not only is the record devoid of any proof of actual harm suffered by the plaintiffs here, but the combination of the advanced reduction and the escrow systems adopted by the unions demonstrates the contrary. *See supra* section IV B. Thus while we do not rule out the possibility of an unconstitutional deprivation of nonconsenting employees' representation fees in other situations, we must conclude that the threshold for injunctive relief in this action was not met.

For these reasons we hold that the district court erred in granting broad injunctive relief against the operation of the New Jersey statute and order that the injunctions be lifted forthwith.

VI.

Half a century ago, the courts of this country confronted the legal issues presented by the National Labor Relations Act and the rise of industrial unionism. From the wellspring that produced the large unions we know today, emerged the various judicial doctrines that by now govern the entirety of the collective bargaining process, from organizing drives to contract negotiations to arbitration of disputes to the rights of individual union members.

In the past half-century, however, the American economy has undergone major changes and these changes have had an impact on both the nature of unions and the issues to be addressed by the law. Not the least of these changes has been the emergence of union activity

in the white collar and public employee sectors. While the case law developed through decades of industrial unionism provides a central framework for resolving the concerns posed by newer areas of labor relations, it is not necessarily conclusive. Particularly with respect to public sector employees, the heightened level of state entanglement raises First Amendment and due process problems that were only tangentially implicated in private sector unionism. Our task in this area, then, is to address those new issues in light of the experiences and policies undergirding American labor law.

Because the district court did not properly weigh the important state policies supporting the creation of public employee unions and the minimal impact of the demand and return systems on the First Amendment and due process interests of dissenting employees paying representation fees, its judgment must be vacated.

For the foregoing reasons, the injunctions will be abated and the consolidated cases remanded to the district court for further proceedings consistent with this opinion.

SLOVITER, *Circuit Judge*, dissenting.

I agree with the majority that lobbying activities that are pertinent to the duties of a public employee union as a bargaining representative and that are not used to advance the political and ideological position of the union may be financed with representation fees. Thus I join parts I, II, and III of the majority opinion. I dissent from the remainder of the opinion that upholds the New

Jersey statute notwithstanding the absence of any effective mechanism for insuring that funds collected from unwilling employees will not be used to subsidize activities in support of a union's political and ideological position.

The district court's ruling in this regard was that N.J.S.A. 34:13A-5.5 and 5.6

> violate plaintiffs' constitutional rights in that (i) these statutory provisions permit labor organizations to receive and use plaintiffs' representation fees for political, ideological and impermissible lobbying purposes over plaintiffs' objections, and (ii) the demand and return system purportedly designed to enable plaintiffs to recover the portion of their representation fees used for political, ideological and impermissible lobbying purposes does not avoid or cure the improper use of representation fees because it is extraordinarly cumbersome and places heavy burdens upon a claimant.

Robinson v. New Jersey, 565 F. Supp. 942, 944 (D.N.J. 1983) (quoting *Robinson v. New Jersey*, 547 F. Supp. 1297, 1321 (D.N.J. 1982)).

I do not view the initial question before us to be whether the protective mechanisms incorporated by the defendant unions are satisfactory. We must reach that issue only if the statute itself can withstand constitutional attack. I agree with the district court that it cannot.

Unlike the majority, I begin with the relevant legal principle enuniciated by the Supreme Court in the most recent case to address the issue, *Ellis v. Railway Clerks*,

104 S. Ct. 1883 (1984). There the Court distanced itself from its earlier dictum in *International Association of Machinists v. Street*, 367 U.S. 740 (1961) and *Abood v. Detroit Board of Education*, 431 U.S. 209, 238-40 (1977), that might be read as supporting the validity of a rebate program. As the Court in *Ellis* pointed out:

> Those opinions did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate.

104 S. Ct. at 1890 (footnote omitted).

I cannot agree with the majority that the relevant precedent is that of *Mathews v. Eldridge*, 424 U.S. 319 (1976), dealing with discontinuation of disability benefits prior to a full evidentiary hearing. Implicated here is the First Amendment, and the substantial right of employees protected by that Amendment not to be forced "to contribute to the support of an ideological cause [they] may oppose". *Abood*, 431 U.S. at 235. As the Court stated in *Ellis*, "By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization." 104 S. Ct. at 1890. Although the Court was referring to the Railway Labor Act, the Court recognized that the central flaw of a system that permits exaction and then relies upon a subsequent refund is that in practical effect it charges the non-members for activities and political positions that may not be charged to them.

In *Abood*, the Court set forth the objective against which the constitutionality of a fee collection arrangement should be measured. It stated: "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activities by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 431 U.S. at 237. Indeed, Justice Stevens, concurring, stressed that a refund very well might not be adequate. He stated that "the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 244.

When we last considered this issue, Judge Adams, in an opinion which I joined, noted: "A number of courts and commentators appear to agree with the observations by Justice Stevens that a funding system requiring continual payments and subsequent refunds to defendants may not satisfy the requirements of the First Amendment." *Galda v. Bloustein*, 686 F.2d 159, 168 (3d Cir. 1982). Justice Stevens' concern about the adequacy of an exaction/refund mechanism seems now to have been accepted by the Court's majority. In *Ellis*, the Court stated, albeit in a statutory analysis:

> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if

> any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily.

104 S. Ct. at 1890. Since the Court held that an exaction/refund mechanism was invalid when advance reduction of dues and/or interest-bearing escrow accounts were available as alternatives, I disagree with the majority's approval of a statute that requires use of the exaction/refund mechanism when, as in *Ellis*, advance reduction of dues and/or use of an interest-bearing escrow account are also available.

The New Jersey statute contains no provision that realistically insures that nonmember fees are not used for purposes that would impermissibly infringe upon their First Amendment rights. The majority refers to the "protective mechanism" of a 15% differential "between the amounts chargeable to fee payers and the union dues of full union members," since "the ceiling of fees to the former is set at 85 percent of the dues of the latter." *See* Majority Typescript Op. at 35. However, I am not persuaded by the majority's suggestion that the statutory fifteen percent differential between union fees and nonunion fee payers satisfies either *Ellis* or the Constitution. Majority Typescript Op. at 35-36 n.12. *Ellis* did not address the elements of a proper "advance reduction" scheme because the case did not require it. I see nothing in the *Ellis* opinion that approves a fixed-percentage reduction that fails to prevent compulsory subsidization of ideological and non-member activities.

The record in this case contains little, if no, evidence

that supports the majority's assumption that impermissible uses of the nonmember representation fee will not exceed 15% of the members' dues. In fact, even as to a union that has made extraordinary efforts to meet the constitutional challenge mounted in this case, expenditures did exceed 15%. The New Jersey locals of the Communication Workers of America "were discovered to have spent between 15.01 per cent and 23.76 per cent of their budgets on arguably non-collective bargaining issues." Majority Typescript Op. at 40, *see* Brief for Appellants CWA in No. 83-5532 at 17; *see also Olsen v. Communication Workers of America*, 559 F. Supp. 754, 760-61 (D.N.J. 1983) (non-chargeable expenditures exceeded 15%). Moreover, the evidence in this record pertains only to these few defendant unions whose practices have been subject to extensive scrutiny and revision following filing of this suit. Other unions may spend considerably more than 15% for ideological and political purposes, particularly in an election year, that are unacceptable to nonmembers. The statute itself contains no provision prohibiting such use in the first instance. As the district court said, "To assume that membership-only expenses and political, ideological and lobbying expenses of each [of the local and national sections of the unions] total 15% or less of pertinent total expenses requires an exercise of faith which should not be required of plaintiffs." *Robinson v. New Jersey*, 547 F. Supp. at 1319.

The only other "protective mechanism" referred to by the majority is the creation by the defendant unions of escrow systems for a portion of the representation fee. Majority Typescript Op. at 35. However, most of these escrow systems were created only after they were mandated by the district court. Since the statute itself makes

no such requirement, such *post hoc* remedial action by these few unions can hardly cure the facial invalidity of the statute.

Thus, the constitutionality of the statute must depend on the adequacy of the demand and return system contained therein, a system not substantially different than that considered inadequate by the Supreme Court in *Ellis*. Under the New Jersey statutory system, after the union meets its initial burden, which the district court said "can be readily met" by "simple and conclusory statements as to expenditures," the fee payer bears the burden of litigating his or her claim through a long chain of internal and administrative proceedings, during which time the union may continue to use the fees for non-member and ideological purposes to which the fee payer objects. As the district court described these cumbersome proceedings.

> the non-members must then go behind those statements to test not only the propriety of the accounting involved but also the assumptions which were made in allocating expenses to member-only benefits, partisan political activities, and varying kinds of lobbying activities. This the non-members must do before the internal union bodies and then before an administrative law judge. They must proceed before the Appeals Board after the administrative law judge makes his findings and recommendations and they are confronted with an appeal to the Appellate Division of the Superior Court of New Jersey and possibly to the New Jersey Supreme Court.

Robinson v. New Jersey, 547 F. Supp. 1297, 1318-19 (D.N.J. 1982).

The district court had an unusually complete opportunity to examine the operation of these provisions before making its final ruling on the facial invalidity of the statute. Although the court did ultimately categorically reject all demand and return systems it did so only at the conclusion of several years' experience in monitoring the operation of various demand and return options. Therefore, the district court's findings merit considerably more deference than the majority accords them. The district court found,

> It has been a useful exercise to examine the CWA demand and return system and the new systems devised by the *Robinson* and *Antonacci* unions after my original opinion in that case. These constituted genuine attempts to create as effective demand and return systems as human ingenuity could devise. Yet each system is complex and overwhelmingly burdensome. Each requires an objecting member to expend such major efforts to pursue his remedy that no individual could be expected to avail himself of the remedy. Thus under the very best demand and return system no objecting non-member can devote the time and money required to ascertain and, if warranted, regain the portion of his representation fee which the union may use for political and ideological purposes. *The statutory requirement of a demand and return system is an illusory remedy.* As a practical matter, therefore, the statute permits a union to take the funds of objecting non-members and use them for the union's own political and ideological purposes. The good faith efforts of the union defendants in these cases to create workable systems demonstrate that no demand and return system can protect an objecting non-member's First Amendment rights.

565 F. Supp. at 945-46 (emphasis added).

These findings serve as confirmation of the concerns articulated by Justice Stevens in *Abood* and of the judgment of the Supreme Court in *Ellis*. From a practical standpoint, an exaction and return system "effectively charges" the employees for impermissible activities. *Ellis*, 104 S. Ct. at 1890.

The New Jersey legislature can readily enact provisions that would reduce the probability that representation fees from nonmembers will be impermissibly used. It could require an advance determination of the amount of the proposed fee and give notice and a hearing before a state tribunal before payment to the union must be made. Even if such an advance determination could not precisely measure the percentage of expenditures that would be used for purposes that could not be charged to nonmembers, a statutory requirement that the union make some pre-exaction effort to determine the percentage would go a long way toward ameliorating the defects in the exaction/return system established by the New Jersey statute. It would place the burden where it rightfully belongs, on the union that chooses to exact such fees and not on the individual members who are now subject to procedures aptly characterized by the district court as "overwhelmingly burdensome." *Robinson v. New Jersey*, 565 F.2d at 945.

Therefore, I would uphold that portion of the injunction that enjoins the union from receiving representation

fees until the statute is amended "so as to include a provision for a hearing before a state tribunal on the validity of any representation fee prior to payment of the fee to the union." 565 F. Supp. at 949.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B-1

First and Fourteenth Amendments to
the United States Constitution, and
42 U.S.C. § 1983.

The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX B-2

New Jersey [Public] Employer-Employee Relations Act, N.J.S.A. 34:13A-2, -3(e), -5.3.

CHAPTER 13A. NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT

34: 13A-2. Declaration of policy

It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes, *both in the private and public sectors*: that strikes, and lockouts, *work stoppages* and other forms of industrial *employer and employee* strife, regardless where the merits of the controversy lie, are forces productive ultimately of economic *and public* waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such *public and private employer-employee* disputes under the guidance and supervision of a governmental agency will tend to promote permanent, industrial *public and private employer-employee* peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this act is hereby declared as a matter of legislative determination. Amended by L. 1968, c. 303, § 3, eff. July 1, 1968.

34:13A-3(e)

The term "representative" is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organization serving as a representative need not be limited in membership to the employees of, the employer whose employees are represented. This term shall include any organization, agency or person authorized or designated by a public employer, public employee,

group of public employees, or public employee association to act on its behalf and represent it or them.

34:13A-5.3 Employee organizations; right to form or join; collective negotiations

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity: provided, however, that this right shall not extend to ~~any managerial executive~~ *elected officials, members of boards and commissions, managerial executives, or confidential employees*, except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations: and provided further, that, except where established practice, prior agreement or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership. The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit. Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting: (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative: and (c) a minority organization shall not present or process grievances. Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations. When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative or an organization of which he is a member and have such grievance adjusted.

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable

times and negotiate in good faith with respect to grievances and terms and conditions of employment.

When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes. *Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.*

L. 1968, c. 303, § 7, eff. July 1, 1968. Amended by L. 1974, c. 123, § 4.

APPENDIX B-3

1980 "Representation Fee" Amendments to
the Act, N.J.S.A. 34:13A-5.5, -5.6.

1980 "REPRESENTATION FEE" AMENDMENTS TO THE ACT - N.J.S.A. 34: 13A - 5.5 - 5.6

34:13A-5.5 Representation fee in lieu of dues; negotiation; agreement; amount; pro rata returns; grounds; proceedings

a. Notwithstanding any other provisions of law to the contrary, the majority representative and the public employer of public employees in an appropriate unit shall, where requested by the majority representative, negotiate concerning the subject of requiring the payment by all nonmember employees in the unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative. Where agreement is reached it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

b. The representation fee in lieu of dues shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefitting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.

c. Any public employee who pays a representation fee in lieu of dues shall have the right to demand and receive from the majority representative, under proceedings established and maintained in accordance with section 3 of this act, a return of any part of that fee paid by

him which represents the employee's additional pro rata share of expenditures by the majority representative that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment of applied toward the cost of any other benefits available only to members of the majority representative. The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer.

L. 1979, c. 477, § 2, eff. July 1, 1980.

34:13A-5.6 Payroll deduction; rights of majority representative; conditions; demand and return system; board for appeals

Where a negotiated agreement is reached, pursuant to section 2 of this act, a majority representative of public employees in an appropriate unit shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees in such unit who are not members of a majority representative: provided, however, that membership in the majority representative is available to all employees in the unit on an equal basis and that the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which provides pro rata returns as described in section 2(c). The demand and return system shall include a

provision by which persons who pay a representation fee in lieu of dues may obtain review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative. Such proceedings shall provide for an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate, who shall serve without compensation but shall be reimbursed for actual expenses reasonably incurred in the performance of their official duties. Of such members, one shall be representative of public employers, one shall be representative of public employee organizations and one, as chairman, who shall represent the interest of the public as a strictly impartial member not having had more than a casual association or relationship with any public employers, public employer organizations or public employee organizations in the 10 years prior to appointment. Of the first appointees, one shall be appointed for 1 year, one for a term of 2 years and the chairman, for a term of 3 years. Their successors shall be appointed for terms of 2 years each and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant. Nothing herein shall be deemed to require any employee to become a member of the majority representative.

L. 1979, c. 477, § 3, eff. July 1, 1980.

APPENDIX B-4

Legislative History of 1980 Amendments
to the New Jersey [Public] Employer-
Employee Relations Act

ASSEMBLY, No. 688

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 9, 1978

By Assemblymen PATERO, JACKMAN and Assemblywoman TOTARO

Referred to Committee on Labor

An Act to amend and supplement the "New Jersey Employer-Employee Relations Act," approved April 30, 1941, (P. L. 1940, c. 100, C. 34:13A-1 et seq.), as said short title was amended by P. L. 1968, c. 303.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 1 of P. L. 1974, c. 123 (C. 34:13A-5.4) is amended to read as follows:

* * *

e. *The commission shall have the exclusive power as hereinafter provided to hear and decide all issues in a fair share fee challenge.*

[e.] f. The commission shall adopt such rules as may be required to regulate the conduct of representation elections, and to regulate the time of commencement of negotiations and of institution of impasse procedures so

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

that there will be full opportunity for negotiations and the resolution of impasses prior to required budget submitted dates.

[f.] g. The commission shall have the power to apply to the Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this act, shall be affirmed and enforced in such proceeding.

2. (New section) Notwithstanding any other provisions to the contrary, no majority representative of public employees in an appropriate unit or public employer of such employees shall be denied from executing an agreement to require the payment by all employees in the unit to the majority representative of a fair share fee for services rendered by the majority representative, subject to the provisions hereinafter stated.

3. (New section) a. The fair share fee for services rendered by the majority representative shall be in an amount equal to the regular membership dues, initiation fees and assessments of the majority representative, less the cost of benefits financed through the dues and available only to members of the majority representative, but in no event shall the fee exceed 85% of the regular membership dues, fees and assessments. Such sum representing a fair share fee shall not reflect the costs of financial support of political causes or candidates except to the extent that it is necessary for the majority representative to engage in lobbying activity designed to foster its

policy goals in collective negotiations and contract administration and to secure for the employees it represents advances in wages, hours and other conditions of employment which ordinarily cannot be secured through collective negotiations with the public employer.

b. The majority representative shall provide advance written notice of the amount of the fair share fee assessment to the commission, the public employer and to all employees within the unit as shall be determined by a list of such employees furnished by the public employer. Any challenge to an assessment by an employee shall be filed in writing with the commission, the public employer, and the majority representative within 30 days after receipt of the written notice by the employee. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the majority representative.

c. The public employer shall deduct the fee from the earnings of the employee and transmit the fee to the majority representative pursuant to section 4 of this act after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the public employer pending a decision by the commission pursuant to section 1 of this act.

4. (New section) Payment of the fair share fee shall be made to the majority representative, during the term of the collective negotiation agreement affecting such employee and during the period, if any, between successive agreements so providing, on or after, but in no case sooner than:

a. The thirtieth day following notice of the amount of the fair share fee as provided for insection 3.b. of this act.

* * *

5. (New section) No agency shop agreement executed pursuant to this act:

a. Shall take effect until the majority representative has established a procedure by which a nonmember employee in the unit can challenge the assessment provided for in section 3 of this act. Such procedure shall allow for a determination by the commission which may be appealed to the Appellate Division of the Superior Court.

* * *

STATEMENT

This public sector "agency shop" bill, a significant revision of previous legislation on the subject, was drafted to include a "fair share" formula for payroll deductions and procedural due process provisions intended to protect the rights of the minority without destroying the rights of the majority.

For many years, the "New Jersey Employer-Employee Relations Act" has required that a majority representative of public employees which has negotiated a labor agreement covering such employees to represent the interests of *all* employees in the bargaining unit, regardless of organizational membership, without discrimination. Non-members of the majority organization, therefore, enjoy virtually equal benefits and protections

without sharing in the costs, incurred by collective negotiations, grievance representation, and other services. In the recent May, 1977 decision of the United States Supreme Court (*Abood et al. v. Detroit Board of Education et al.*) which upheld the constitutional validity of state "agency shop" legislation, the Court pointed to the fact that the tasks of negotiating and administering an agreement are continuing and difficult ones and entail the expenditure of much time and money, often requiring the services of lawyers, expert negotiators, economists, research staff, as well as administrative personnel. In that decision, the Court went on to state that "a union shop arrangement has been thought to distribute fairly the costs of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free-riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." Many analysts feel that union security agreements such as the agency shop are vital to the stability and sense of responsibility of public sector unions.

The proposed actual amount of the fair share fee to be deducted is to be equal to regular dues, initiation fees and assessments less the cost of benefits financed through the dues and available only to members—and in no event greater than 85% of dues—similar to legislation now in effect in Minnesota. Due process guarantees in the bill provide that a (non-member) public employee will have (a) the right to advance notice of the amount of an impending fair share fee to be deducted from his earnings; (b) the right to bring an administrative action thay may be appealed in court to challenge the amount

of the withheld fee; and (c) the right to have the fair share fee held in escrow pending such a determination.

When considering challenges to a union's use of service fees, however, the Commission and the courts would be expected to distinguish between political activities which are partisan or idealogical and lobbying activities which are integral to economic well-being of all employees represented.

ASSEMBLY LABOR COMMITTEE
STATEMENT TO
ASSEMBLY, No. 688
with Assembly committee amendments

STATE OF NEW JERSEY

DATED: JUNE 19, 1978

The Assembly Labor Committee favorably reports this legislation to establish a modified "agency shop" in the public sector as a required subject of negotiations at the request of the majority representative. The statement appended to and printed with the bill adequately explains its provisions except that amendments adopted by the committee alter the description contained in the statement's last two paragraphs.

Within a given negotiating unit, this bill is intended to protect the rights of nonmembers of a public employee union without unfairly burdening its regular members with the cost of union services benefiting the nonmembers in the unit. Existing law requires all majority representatives of public employees to represent the interests of all employees in the negotiating unit, regardless of membership, without discrimination. The legislation would not require any public employee to actually join a union against his wishes. Moreover, the bill's provisions would not apply to public employees who are not a part of an existing negotiating unit represented by a majority employee organization.

The Public Employment Relations Commission had

indicated to the committee that the role originally intended for it as an arbiter of fee challenges would have placed a heavy administrative burden on it and slowed its processing of unfair labor practice charges as well as scope of negotiation and unit determinations. At the urging of a coalition of public employee associations and unions, the committee amended the bill along the lines of a recommendation contained in the U.S. Supreme Court's "*Abood*" decision (425 U.S. 949), which upheld the constitutional validity of state "agency shop" legislation. That suggestion was for a "demand and return" refund system based on a rebate after objection of any portion of fees used by the union for partisan political or ideological purposes only incidentally related to the terms and conditions of employment. The pro rata share of expenditures by the majority representative subject to refund to a nonmember, where an objection is made, would also have to include the costs of "any other benefits available only to members," e.g. contributions to charitable or religious organizations or causes; fines, penalties or damages arising from the unlawful activities of a bargaining agent; social or recreational activities; costs of educational activities unrelated to collective negotiations, contract administration or lobbying for improved wages and benefits; costs of medical insurance; retirement benefits or other benefit programs; and costs incurred by the bargaining agent to organize employees who are not included in the bargaining unit.

Under the terms of the bill, as amended, nonmembers can appeal the amount of any union-determined rebate by bringing their cases (individually or collectively) before a three-member tripartite board with staggered terms which would be appointed by the Governor with

the advice and consent of the Senate. It would have a strictly impartial chairman, representing the interest of the public, who has had no more than a casual association or relationship with any public employers, public employer organizations or public employee organizations in the 10 years prior to appointment.

The bill was opposed by the New Jersey School Boards Association, the New Jersey State Chamber of Commerce and the New Jersey Business and Industry Association. It was supported by the State Coalition of Public Employees (S. C. O. P. E.) which included the NJCSA, the NJSEA, AFSCME, the NJEA and AFT as well as the NJFBA, IFA, PBA, IFPTE, the Service Employees International Union and the Teamsters.

ASSEMBLY COMMITTEE AMENDMENTS TO

ASSEMBLY, No. 688

STATE OF NEW JERSEY

ADOPTED JUNE 12, 1978

Amend page 3, section 1, lines 74-75, omit in their entirety.

Amend page 3, section 1, line 76, omit "f.", insert "e.".

Amend page 3, section 1, line 32, omit "g.", insert "f.".

Amend pages 3-5, sections 2-5, omit in their entirety, insert new sections 2 through 5 as follows:

"2. (New section) a. Notwithstanding any other provisions of law to the contrary, the majority representative and the public employer of public employees in an appropriate unit shall, where requested by the majority representative, negotiate concerning the subject of requiring the payment by all employees in the unit to the majority representative of a representative fee in lieu of dues for services rendered by the majority representative. Where agreement is reached it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

b. Public employees in an appropriate unit who are not members of the majority representative in that unit shall be subject to a payroll pay deduction of a representation fee in lieu of dues to the majority representative, as provided in section 3 of this act. The representation fee in lieu of dues shall be equivalent to the dues, initiation fees and assessments charged by the majority representative to its own members.

c. Any public employee who pays a representation fee in lieu of dues shall have the right to demand and receive from the majority representative, under proceedings established and maintained in accordance with section 3 of this act, a return of any part of that fee which represents the employee's pro rata share of expenditures by the majority representative in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment. The pro rata share subject to refund shall also reflect the cost of any other benefits available only to members of the majority representative. The pro rata share shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer.

3. (New section) Where a negotiated agreement is reached pursuant to section 2 of this act, a majority representative of public employees in an appropriate unit shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees in such unit who are not members of a majority representative; provided, however, that membership in the majority representative is available to all employees in the unit on an equal basis and that the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which provides pro rata returns as described in section 2 (c). The demand and return system shall include a provision by which persons who

pay a representation fee in lieu of dues may obtain review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative. Such proceedings shall provide for an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate, who shall serve without compensation but shall be reimbursed for actual expenses reasonably incurred in the performance of their official duties. Of such members, one shall be representative of public employers, one shall be representative of public employee organizations and one, as chairman, who shall represent the interest of the public as a strictly impartial member not having had more than a casual association or relationship with any public employers, public employer organizations or public employee organizations in the 10 years prior to appointment. Of the first appointees, one shall be appointed for 1 year, one for a term of 2 years and the chairman, for a term of 3 years. Their successors shall be appointed for terms of 2 years each and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant. Nothing herein shall be deemed to require any employee to become a member of the majority representative.

* * *

FROM THE OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE
FEBRUARY 27, 1980

FOR FURTHER INFORMATION
PATRICK J. SWEENEY

Governor Brendan Byrne today signed the following bills in a public ceremony in the Chambers of the New Jersey State Assembly:

A-688, sponsored by Assemblyman Joseph D. Patero (D-Somerset), which is known as the "agency shop" bill. The bill requires payment of a "representation fee in lieu of dues" to the majority representative union by non-members.

The representation fee is to be the equivalent of regular membership dues, initiation fees and assessments, less the cost of benefits so financed which are available only to members. In no event, however, can the representation fee exceed 85 percent of the regular charges.

In addition, a non-member who pays the representation fee may receive refund on a pro rata basis of the cost of: (1) political or ideological activities which are only inadvertently related to the employment; or (2) other benefits available only to members. This does not include lobbying connected with the terms or benefits of the employment.

The bill will take effect on July 1, 1980.

* * *

APPENDIX B-5

N.J.A.C. 1:20-1.1 *et seq.*

OFFICE OF ADMINISTRATIVE LAW

TITLE 1

RULES OF SPECIAL APPLICABILITY

CHAPTER 20

HEARINGS BEFORE THE PUBLIC EMPLOYEE RELATIONS APPEAL BOARD

September 20, 1983

SUBCHAPTER 1. APPLICABILITY AND DEFINITIONS

1:20-1.1 Applicability

In addition to the Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1.1, the following rules of special applicability[1] shall apply to any hearing initiated before the Public Employment Relations Commission Appeal Board pursuant to P.L. 1979, c.477, (N.J.S.A. 34:13A-5.5. et seq.) To the extent that these rules of special applicability are inconsistent with the UAPR, these rules shall apply.

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[1] An attempt has been made to codify these rules of special applicability so that their subchapter designations are generally consistent with the subchapter designations of corresponding subject matter in the Uniform Administrative Procedure Rules of Practice. Thus, Subchapter 1. of these special rules deals with Applicability and Definitions, since Subchapter 1. of the UAPR (N.J.A.C. 1:1-1) deals with Applicability and includes definitions. This method of codification is for the sake of the user's convenience only, and has no legal implications or effects.

* * *

SUBCHAPTER 4. TIME FOR FILING OF PETITION AND ANSWER

1:20-4.1 Time for filing of petition; exhaustion of demand and return system

(a) At any time after the nonmember has exhausted, or has made a good faith attempt to exhaust, the demand and return system required to be maintained by the majority representative, the nonmember may file a petition with Appeal Board.

(b) If during the administrative processing of the petition of appeal, it is determined that the majority representative's demand and return system has either not been utilized to resolve the dispute or that the demand and return proceeding has not been completed, the Appeal Board may take whatever action it deems appropriate, including but not limited to dismissing the petition of appeal, staying proceedings before the Board pending the completion of the majority representative's demand and return system, or continue to process the petition.

(c) A nonmember of a majority representative who has a claim pending in the majority representative's demand and return system may intervene in a proceeding before the Appeal Board involving the same majority representative, collective negotiations agreement, public employer and the same period of time, notwithstanding that the nonmember has not yet exhausted the majority representative's demand and return system.

1:20-4.2 Time for filing answer

No later than 20 days from the date of service of the petition upon the respondent by the petitioner, the respondent shall file with the Appeal Board and serve upon the petitioner an answer to the petition. For good cause, the Appeal Board may extend the time for answer. Failure to file and serve an answer on time may result in a default judgment against the respondent.

* * *

SUBCHAPTER 6. PETITION AND ANSWER

1:20-6.1 Contents of petition

(a) A petition shall be in writing and signed by the nomember(s) making the complaint. More than one nonmember in the same negotiations unit may sign a petition.

(b) A blank form for filing such a petition will be supplied upon request. Requests shall be addressed to: Public Employment Relations Commission Appeal Board, 429 East State Street, Trenton, NJ 08608.

(c) The petition shall contain the following:

1. The full name, address and telephone number of the nonmember filing the petition and, where applicable, the name, address and telephone number of any autho-

rized representative;

2. The full name and address of the majority representative of the nonmember's collective negotiations unit;

3. The full name and address of the public employer of the nonmember filing the petition;

4. The amount of the representation fee in lieu of dues, and, where known, the amount of the regular membership dues, initiation fees and assessments charged by the majority representative to its own members;

5. A statement of the grounds for the nonmember's belief that the representation fee in lieu of dues is excessive or improper, including a brief recitation of the facts, if any, which give rise to the belief that the fee is excessive. It shall be sufficient for the petitioner to state opposition either to all expenditures of a political or ideological nature only incidentally related to the terms and conditions of employment, or to expenditures applied toward the costs of any benefits available only to members of the majority representative, or to both; and

6. A statement as to whether the nonmember filing the petition has exhausted the majority representative's demand and return system and the result of that proceeding. If the result of that proceeding was in written form, a copy of the writing should be appended to the petition.

(d) The petition shall constitute the first pleading for

the purposes of N.J.A.C. 1:1-6.2.

1:20-6.2 Contents of answer

(a) An answer shall be in writing and signed by a representative of the respondent.

(b) An answer shall contain the following:

1. A statement of the amount of the regular membership dues, initiation fees and assessments charged by the majority representative to its own members in the petitioner's collective negotiations unit;

2. A statement of the representation fee in lieu of dues charged the petitioner;

3. A description of the disposition of the petitioner's demand and return system proceeding. A copy of any written decision or result of that proceeding shall be appended as an exhibit to the answer, unless it has been appended to the petition;

4. A clear and concise statement which specifically admits, denies or explains any factual allegations contained in the petition; and

5. Any affirmative defenses to the legal and factual allegations of the petition.

* * *

SUBCHAPTER 15. EVIDENCE

1:20-15.1 Evidence of demand and return proceedings

The record, or any portion of it, developed at the demand and return system proceeding may be introduced as evidence by either party, subject to the general rules of evidence contained in N.J.A.C. 1:1-15.

* * *

SUBCHAPTER 16. CONCLUSION OF HEARING

1:20-16.1 Oral argument on exceptions

(a) As part of any written exceptions to an initial decision, a party may file a written request for oral argument on the exceptions before the Appeal Board. The written request shall be served, along with the exceptions, upon the other parties to the hearing.

(b) If the Appeal Board grants the request for oral argument, the Appeal Board shall give each party at least five days notice of the date of the argument.

(c) Only issues and evidence of record at the hearing may be considered at the oral argument. No new issues or evidence may be presented.

1:20-16.2 Motion to reopen

A party to a proceeding before the Appeal Board may, because of extraordinary circumstances, move to reopen the matter after the Appeal Board decision has been ren-

dered. The movant shall state with particularity the grounds claimed and, where applicable, shall specify the portion of the record relied upon. Any motion pursuant to this section shall be filed within 15 days after service of the Appeal Board decision. Copies shall be served on the parties of record, and a statement of service shall be filed with the motion papers. The filing and pendency of a motion for reconsideration shall not operate to stay the effectiveness of the Appeal Board decision unless otherwise ordered by the Appeal Board. A motion to reopen need not be filed to exhaust administrative remedies.

APPENDIX C-1

Decision of the U.S. Court of Appeals for the Third Circuit in *Robinson/Antonacci/Olsen v. State of New Jersey* Denying Sur Petition For Panel Rehearing and Rehearing En Banc, September 11, 1984.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 82-5698, 82-5750, 83-5403, 83-5459
83-5532, 83-5533, 83-5563, 83-5569

PAUL H. ROBINSON, *et al.*
Appellees, Cross-Appellants

v.

STATE OF NEW JERSEY, *et al.*,
(C. A. NO. 82-1118) *Appellants*

JOSEPH W. ANTONACCI, *et al.*
Appellees, Cross-Appellants

v.

STATE OF NEW JERSEY, *et al.*,
(C. A. NO. 82-1119) *Appellants*

ALLEN OLSEN, *et al.*
Appellees, Cross-Appellants

v.

STATE OF NEW JERSEY *et al.*,
(C. A. NO. 82-3443) *Appellants*

SUR PETITION FOR PANEL REHEARING AND REHEARING IN BANC

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges*, and TEITELBAUM, *District Judge*[*]

The petition for panel rehearing or rehearing in banc filed by appellees/cross-appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for panel rehearing or rehearing in banc is denied.

By the Court,

/s/ Arlin M. Adams
Circuit Judge

DATED: September 11, 1984

[*] As to panel rehearing only.

APPENDIX C-2

Order of the U.S. Court of Appeals
for the Third Circuit in *Robinson/Antonacci/*
Olsen v. State of New Jersey
Staying Issuance of Judgment, September 20, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 82-5698, 82-5750, 83-5403, 83-5459,
83-5532/3, 83-5563 & 83-5569

Paul H. Robinson, et al, Appellees, Cross-Appellants
vs.
State of New Jersey, et al, Appellants, etc.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until October 18, 1984.

/s/ Arlin M. Adams
Circuit Judge

DATED: September 20, 1984

APPENDIX C-3

Order of the U.S. Court of Appeals for the Third Circuit in *Robinson/Antonacci/Olsen v. State of New Jersey* Lifting Stay of Judgment, October 5, 1984.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

September 24, 1984

NOS. 82-5698, 82-5750, 83-5403,
83-5459, 83-5532/3, 83-5563 & 83-5569

PAUL H. ROBINSON, etc.
vs.
STATE OF NEW JERSEY, etc.

Present: ADAMS, *Circuit Judge*

1. Appellants' Motion for Reconsideration of Issuance of Stay and to Lift Stay.

2. For your information the order staying the issuance of the mandate to and including October 18, 1984 was filed on September 20, 1984.

in the above-entitled cases. Any Answer which would be due by October 4, 1984, will be forwarded upon receipt of same.

Respectfully,

/s/ Sally Mivos/bg
Clerk

Appellants' motion for reconsideration of the issuance of the stay and to lift the stay is hereby granted.

In view of Judge Sloviter's position on the merits, she dissents from this order.

By the Court,

/s/ Arlin M. Adams

Circuit Judge

DATED: October 5, 1984

APPENDIX C-4

Judgment of the U.S. Court of Appeals
for the Third Circuit in *Robinson/Antonacci/Olsen v. State of New Jersey*, August 6, 1984.

Nos. 82-5698, 82-5750, 83-5403, 83-5459,
83-5532, 83-5533, 83-5563 and 83-5569

Present: ADAMS and SLOVITER, *Circuit Judges* and
TEITELBAUM, *District Judge*[*]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel February 27, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, entered October 19, 1982, July 1, 1983, in D.N.J. Civil No. 82-1119; October 19, 1982, July 1, 1983, July 1, 1983, in D.N.J. Civil No. 82-1118; May 13, 1983 and July 1, 1983 in D.N.J. Civil No. 82-3443; enjoining the operation of the representation fee provision in the New Jersey Employer Employee Relations Act, appealed here respectively at Nos. 82-5698 and 83-5533 (from D.N.J. Civil No. 82-1119); 82-5750, 83-5563, and 83-5569 (from D.N.J. Civil No. 82-1118); and 83-5403, 83-5459 and 83-5532 (from D.N.J. Civil No. 82-3443) be, and the same are hereby vacated, the injunctions are dissolved, and the consolidated cases are remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

August 6, 1984

[*] Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation.

APPENDIX C-5

Transcript of Proceedings in *Robinson v. State of New Jersey* Denying Motion for Stay, July 15, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NOS. 82-1118, 82-1119, 82-3443

PAUL H. ROBINSON, *et al.*,
Plaintiffs.

v.

STATE OF NEW JERSEY,
THOMAS H. KEAN, GOVERNOR, *et al.*,
Defendants.

JOSEPH W. ANTONACCI, *et al.*,
Plaintiffs.

v.

STATE OF NEW JERSEY,
THOMAS H. KEAN, GOVERNOR, *et al.*,
Defendants.

ALLEN OLSEN, *et al.*,
Plaintiffs.

v.

COMMUNICATIONS WORKERS OF AMERICA (CWA), *et al.*,
Defendants.

TRANSCRIPT OF PROCEEDINGS

MOTION FOR STAY

July 15, 1983

BEFORE: HONORABLE DICKINSON R. DEBEVOISE, U.S.D.J.

APPEARANCES: STEIN & SHAPIRO, ESQS.,
BY: JEFFREY A. MINTZ, ESQ.,
and
NELSON R. KIEFF, ESQ., (VA)
For the Plaintiffs

* * *

THE COURT: All right. Let me just give a few reasons for my ruling.

I think the focus on the money, both by the plaintiffs and by the defendants, is not the essence of the issue here. I think by way of the case and its conduct has been structured, we are not dealing with substantial sums of money in either sense.

In each sense the money is symbolic of larger issues. The plaintiffs' loss of a few dollars, which they cannot spend on political purpose, if that's all it were, would not be compelling. Similarly, the loss of the dues of these particular plaintiffs, rather few in number relative to the number of union members involved, is not extraordinary insofar as the union being able to continue effectively performing their representation functions.

What seems to me is the problem is we have a statute which, the more I look at it, the more extraordinary it seems in that it specifically authorizes mandatory withholding of money from workers' salaries, which may be used in the first instance for political lobbying purposes, with the proviso that there be a mechanism whereby those who object to this can get it back.

I think that is so extraordinary, an abridgment of First Amendment rights, that the relief might well have been granted at the outset of this case enjoining enforcement of the statute altogether back in June or July of 1982.

Instead, perhaps erroneously, I took an extraordinarily time consuming method of approaching it because of the very considerations of which the defendants' attorneys

had addressed because of the importance of the representation fee and the structuring and operation of collective bargaining in New Jersey.

I moved at what I'm sure the plaintiffs considered a snail's pace. There were hearings, further briefing, going step by step, not declaring—not certifying it as a class action in order to try to avoid any disruptive effects.

But in the meantime, we have a statute which, if I interpret it correctly, and if I view it correctly, is on a continuing basis imposing a very serious First Amendment deprivation upon all the persons who are subject to it, who object to the use of their fees for these purposes.

The delay can be viewed as an opportunity to see if in fact the statute works as one feared it might work, were it to create an illusory method for those who object to recover a portion of their representation fee which is used for purposes other than collective bargaining negotiations, administration of contracts and conducting grievance procedures.

The more the facts developed, the more it became very apparent that even with the best of intention on the part of the unions, there just can be no effective method of recovering, ascertaining, much less recovering, in a reasonable, expeditious manner the portions of the withheld payments used for impermissible purposes.

So, thus we are faced, I think, with a situation which has not prevailed previously, which is a state authorized fee imposed on nonconsenting persons to be used for political and lobbying activities with which they disagree.

I think the equivalent of the restraint urged by the Supreme Court in various cases has been exercised here by the extraordinarily slow approach to reaching the point where we are now. I've given the various parties and the legislature an opportunity to remedy, what seemed to me, after rather lengthy examination, patent violations of the United States Constitution's First Amendment.

Having gotten to this point, I think it is appropriate to enjoin the collection of any of these fees from those who are plaintiffs in this case. I think the harm to the defendants will not be extraordinary. Should I prove to be wrong on the evaluation of the facts and the evaluation of the law, the more I see it, I think the less likelihood is that I will be considered incorrect. But then, again, I've been found incorrect before.

I don't think the issues in my mind are as uncertain as all that at this point. Therefore, I'm going to deny a stay.

I think the matter should proceed with as much speed as possible in the various appellate courts so that we will have a definitive ruling and the matter can be finally determined where it probably has to be determined, in the United States Supreme Court.

I think this is a particularly good case to look at the question because the facts are pretty well developed, and we have many combinations and varieties of situations, local unions, national unions, intermediate union organizations, various types of state employees, and I think it presents to the appellate courts a wide range of situa-

tions to which the various legal contentions can be addressed.

I realize this presents a problem, perhaps to state employers who will be paying representation fees over the objections of others who are not party to this case, but that's not a problem before me, and I think that will prevail in any event. But that we'll just have to leave for future developments.

So, with all due respect, Mr. Coppess, Mr. Chanin, others who are seeking the stay, I will deny it. I think, obviously, the route is open to review everything I've done.

With all humility, I think that's the approach you ought to take. I've tried to develop the facts and the law here as best I could, and I think we are fortunate we have a fresh look at it to see what—how others will view the situation.

I must say it has been excellent briefing, excellent advocacy, and I think you are fortunate to have an exciting issue with which you can wrestle.

Now you can wrestle with it in the Third Circuit.

* * *

APPENDIX C-6

Opinion of the U.S. Court of Appeals
for the Seventh Circuit in *Hudson*
v. Chicago Teachers Union Local
No. 1, September 6, 1984.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 83-3118

ANNIE LEE HUDSON, et al.,

Plaintiffs-Appellants,

v.

THE CHICAGO TEACHERS UNION
LOCAL NO. 1, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 C 2619—Nicholas J. Bua, *Judge.*

ARGUED MAY 31, 1984—DECIDED SEPTEMBER 6, 1984

Before POSNER and FLAUM, *Circuit Judges*, and GORDON, *Senior District Judge.*[*]

POSNER, *Circuit Judge.* The Chicago Teachers Union has a collective bargaining contract with the city's Board of Education that makes the union the exclusive agent of teachers and certain other employees of the Board for collective bargaining. The contract contains a union-security clause which requires members of the bargaining unit who do not want to join the union to pay the union their proportionate share of the costs of the union's efforts to

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[*] Hon. Myron L. Gordon, of the Eastern District of Wisconsin, sitting by designation.

negotiate and administer the collective bargaining contract with the Board. The Board deducts this amount (the "agency fee") from these employees' wages, just as it deducts union dues from union members' wages. The plaintiffs, nonunion employees of the Board, brought this suit against the Board and its members and the union and its officers under section 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983 (the plaintiffs have abandoned their pendent claims), challenging the procedure established pursuant to the collective bargaining contract for determining the proportionate share that nonunion employees must contribute to the support of the union as collective bargaining agent. After a bench trial, the district judge upheld the validity of the procedure, and the plaintiffs have appealed.

After *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—like this a suit by nonunion employees of a school board against the board and the union, complaining that the union-security clause in the board's collective bargaining contract with the union violated the First Amendment as made applicable to the states by the Fourteenth Amendment—the plaintiffs cannot argue that a union-security clause violates the First Amendment even though it forces them to support financially an organization the policies and objectives of which they may disagree with, but which, disagree or not, they do not want to pay money to support. Since the collective bargaining contract makes the union the agent of all the employees in the collective bargaining unit, whether or not they are union members, every employee can be made to pay his proportionate share of the expenses that the union incurs in carrying out its responsibilities as agent; otherwise the nonunion employees would be taking

a free ride on the union members' expenditures.

No more is it open to the defendants, after *Abood*, to contest the proposition that they may not, without violating the First Amendment, use money involuntarily extracted from the plaintiffs "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative." 431 U.S. at 235. It is true that the union is a private entity; that the Board, in withholding an "agency fee" from its employees' wages, was acting as the union's agent; and that section 1983 only reaches action under color of state law. But when a public employer assists a union in coercing public employees to finance political activities, that is state action; and when a private entity such as a union acts in concert with a public agency to deprive people of their federal constitutional rights, it is liable under section 1983 along with the agency. See *Tower v. Glover*, 104 S. Ct. 2820, 2824-25 (1984); *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980).

The unusual feature of this case is that the plaintiffs, while objecting in passing to particular uses of the agency fee, make almost their whole attack on the procedure for determining how much shall be deducted. A threshold question therefore is whether such an attack can be based on section 1983, which so far as pertinent to this case creates a federal remedy for the deprivation, under color of state law, of liberty, without due process of law. Although this question has not been discussed extensively, an affirmative answer is implicit in our decision in *Perry v. Local Lodge 2569 of Int'l Ass'n of Machinists*, 708 F.2d 1258, 1261-62 (7th Cir. 1983), and

in the Third Circuit's recent decision in *Robinson v. New Jersey*, Nos. 82-5698 et al. (3d Cir. Aug. 6, 1984), and is also supported by the Massachusetts Supreme Judicial Court's decision in *School Committee v. Greenfield Education Ass'n*, 385 Mass. 70, 78-86, 431 N.E.2d 180, 186-90 (1982).

Most cases involving a union's duty not to use agency fees to support political or ideological endeavors that are not germane to the union's responsibilities as collective bargaining agent have arisen under the federal labor-relations statutes, either the National Labor Relations Act or the Railway Labor Act, rather than the Constitution. See, e.g., *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768-69 (1961). Those statutes have been interpreted to require a union to represent fairly all the members of the bargaining unit for which the union is the exclusive agent, and this obligation in turn has been interpreted to include a specific duty to the unit's nonunion employees to establish procedures that will make sure that the employees are not forced to pay for union activities other than those the union undertakes in its agency role. Maybe a similar duty could be inferred from the Illinois statute (Ill. Rev. Stat. 1981, ch. 122, ¶ 10-22.40a) that authorizes agency-fee clauses in collective bargaining contracts with school boards. *Meylor v. Boys*, 101 Ill. App. 3d 148, 153, 427 N.E.2d 1023, 1026 (1981), so suggests, in part by citing *Vaca v. Sipes*, 386 U.S. 171 (1967), a leading case on the duty of fair representation under federal labor law. But the violation of a duty under state law could not be challenged under 42 U.S.C. § 1983. Nor can we force the plaintiffs to allege such a violation, although if they had (more precisely, if they had not abandoned their pendent claims), we would

have the power to decide the state-law issue first in order to avoid having to decide federal constitutional issues. *Hagans v. Lavine*, 415 U.S. 528, 545-50 (1974). Pendent jurisdiction is not compulsory; and federal civil rights claimants are not required to exhaust their state remedies, *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and *a fortiori* need not give a federal judge an opportunity to adjudicate state-law claims that they might have raised but did not.

The plaintiffs also cannot base their section 1983 claim on the discussions in *Abood* and other cases of the proper remedy once improper use of revenues generated by an agency fee is proved. See 431 U.S. at 237-42. These discussions presuppose the existence of a federal right that the improper expenditures violated. See *Ellis v. Brotherhood of Railway Clerks*, 104 S. Ct. 1883, 1890 (1984). The question here is whether the plaintiffs have a federal right to challenge a procedure that may not have resulted in any improper expenditures—whether, in other words, even if the union has not used any of the money it has collected from objecting employees to promote political activities unrelated to its role in collective bargaining, the plaintiffs can still complain that they have been deprived of the liberty secured them by the Constitution.

We think they can, and on two grounds (conflated in *Robinson v. New Jersey, supra*, slip op. at 30-31). First, a procedure that, lacking reasonable protections for nonunion employees, makes it likely that some of the money collected from them will be used to support political objectives not germane to the union's function in the collective bargaining process infringes the First Amendment

even if the procedure is not shown to have resulted in any improper expenditures. Just the danger (as distinct from actuality) of depriving people of the freedom of expression guaranteed by the First Amendment has led courts to invalidate procedures that created the danger. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-62 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); Tribe, American Constitutional Law 724-36 (1978); Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518 (1970). This body of First Amendment law has a long historical pedigree. At common law, free speech meant freedom from prior restraints—a procedural right. The press could not be licensed although it could be punished, after the fact in a criminal proceeding, for "disseminating . . . bad sentiments." 4 Blackstone, Commentaries on the Laws of England 152 (1769); see Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression 248 (1960). The present case, remote as it is from the classic prior restraint, illustrates in a new setting the close relationship between procedure and substance in free-speech cases. Since even a local union may have many members, and since most of the expenditures that a union makes are germane to its responsibilities in the collective bargaining process and thus do not violate the First Amendment even when the money expended comes in part from dissenting employees, the amount of monthly deductions potentially at issue in cases such as this is small for each such employee. As a result, most violations of the First Amendment caused by union-security clauses or union-shop clauses (which require all employees actually to join the union) would go unremedied—maybe even undetected—if the employer had no

duty to establish workable procedures for protecting dissenters' rights. We interpret the First Amendment to create such a duty. True, in the cases cited earlier the duty was to those who wanted to speak rather than to those who wanted to dissociate themselves from a speaker. But the money that an objecting employee is compelled against his will to spend to support a union's political views is money not available to him to support other political activities, and this indirect effect on the marketplace of ideas is we think sufficient to require the creation of procedures that protect against such compulsion.

The defendants owe another constitutional duty to these plaintiffs—a "due process" duty as distinct from a "free speech" duty. We have put quotation marks around these terms to acknowledge that the terms are imprecise, and require explanation. The due process clause of the Fourteenth Amendment, besides being the vehicle by which parts of the Bill of Rights, including the First Amendment, have been held to be applicable to the states, is an autonomous source of rights, including the right not to be deprived of liberty without receiving the procedural safeguards summarized by the words "due process." The standard safeguards are timely and adequate notice of the impending deprivation and a reasonable opportunity for a hearing before an impartial adjudicator. Although forcing a public employee to support a union does not take away his freedom of speech—provided his money is not used to pay for political or ideological activities that he disapproves of—it does deprive him of "liberty" within the meaning of the Fourteenth Amendment, and therefore requires the employer to give him due process of law in the sense of fair proce-

dure, quite apart from any procedural safeguards required by the First Amendment directly.

The liberty in question is freedom of association. Although one could conceive of this freedom as extending over the whole range of private associations that are important to Americans—from the nuclear family to the social club to the political party—the cases, as we were reminded just the other day by the Supreme Court, mainly involve either the family or, as is more pertinent to the present case, associations having political or ideological goals, see *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3249-55 (1984); and in political-association cases freedom of association is an offshoot of freedom of speech. See Tribe, *supra*, at 700-10. But we need not explore in this case the outer bounds of freedom of association. Although the primary goals of American trade unions are economic rather than political or ideological, American unions have always sought to further their goals in part by appeals to public opinion. To join a union is to join an association engaged in the dissemination of ideas and opinions that may be controversial.

The particular freedom of association we are speaking of—the freedom that is ancillary to freedom of speech—has a negative as well as a positive dimension. "Freedom of association . . . plainly presupposes a freedom not to associate," *Roberts v. United States Jaycees*, *supra*, 104 S. Ct. at 3252 (citing *Abood*); see *Elrod v. Burns*, 427 U.S. 347, 357, 363-64 n. 17 (1976) (plurality opinion); *Abood v. Detroit Board of Education*, *supra*, 431 U.S. at 235; *Robinson v. New Jersey*, *supra*, slip op. at 15, which is infringed by making someone contribute money to an association engaged in political or ideological

activities. True, freedom of association, whether positive or negative, is no more absolute than the other liberties that the due process clause protects against deprivation without due process of law. But the fact that it enjoys the procedural protections capsulized in the term "due process" means that the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go no further than is necessary to prevent the individual from taking a free ride on an entity that (whether or not he wants to support it) is providing services to him as his collective bargaining representative.

The Supreme Court in *Abood* had no occasion to decide whether an agency fee exacted by a public employer on the union's behalf from a dissenting employee deprives the employee of his liberty of association and therefore may not be exacted unless the dissenter is given due process of law. But the Court did remark that "to compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," and "to be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." 431 U.S. at 222. By adding that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," the Court made clear its view that even the use of agency fees for contract negotiation and administration is an interference with

First Amendment liberty (though a lawful interference), offering as an example the union's negotiating a clause requiring the employer to reimburse employees for the expense of abortions. *Id.*; see also *id.* at 256 (concurring opinion); *Roberts v. United States Jaycees, supra.* 104 S. Ct. at 3255; *id.* at 3257-61 (concurring opinion). Such interference is a deprivation of liberty that is forbidden to the states and their agencies without due process of law. Contrary intimations in *Railway Employes' Dep't v. Hanson.* 351 U.S. 225, 236-38 (1956), are no longer authoritative.

The two grounds we have suggested for regarding the plaintiffs' procedural challenge as properly brought under section 1983—free speech and due process, as we have loosely called them—have different implications for the scope of protection. The first implies that the public employer must establish a procedure that will make reasonably sure that the wages of nonunion employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining. The second implies that the procedure must make reasonably sure that those employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological. Thus expenditures not germane to collective bargaining, but not political or ideological either, would have a different status under the first and second grounds. But since the second ground is valid, it follows that the employer's obligation is not limited to establishing a procedure for preventing the diversion of nonunion employees' wages to political or ideological activities unrelated to the union's collective bargaining responsibilities; the procedure must make

reasonably sure that the agency fee is not used for any unrelated activities.

Having established the legal standard for evaluating the procedure in this case, we turn to the particulars of that procedure. Soon after the union-security clause became effective on September 1, 1982, the union calculated the percentage of its expenditures that it believed (or at least claimed) had been costs of negotiating or administering the contract during the fiscal year that ended on June 30, 1982. On the basis of this calculation it set the agency fee at 95 percent of the union dues (for teachers, those dues were $17.35 a month for 10 months of the year), and asked the Board to deduct this percentage from the wages of nonunion employees. The Board began doing so in December 1982. But it did not tell the employees how the 95 percent figure had been arrived at, or about the procedure that had been established for challenging the figure, although the union described the procedure in the December issue of the union newspaper, which was widely circulated to nonmembers. Under the procedure, an objecting nonunion member has 30 days after the agency fee is first deducted from his paycheck to file an objection with the union. The union's executive committee reviews the objection. If it rejects it, the objector has 30 days to appeal to the committee, and if he appeals in time he is entitled to a personal hearing. If his objection is turned down on the basis of that hearing, he can ask for arbitration. The union's president picks the arbitrator from a list of arbitrators accredited by the state board of education; the union pays the arbitrator's fee; and the arbitrator's decision is final. If at any stage in the proceeding the objecting employee succeeds in getting the agency fee reduced, he is entitled to a rebate of

the excess that has already been deducted from his wages, as well as to a reduction in future deductions. The union must make the same reduction for all other nonmembers as well, including those who were not parties to the grievance proceeding; but apparently it is not required to give them any rebate. None of the plaintiffs followed the prescribed procedure through to the end (some did not invoke it at all), but that is unimportant if the procedure violates their constitutional rights.

The most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees. Cf. *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963, 975 (D.P.R. 1983). It is not surprising therefore that some of the plaintiffs thought it futile even to ask the union to reduce the fee. Their perception was reinforced by the way in which the union handled their objections to the amount of the fee: as the district judge found, the union hindered (through inexperience, though, not malice) the efforts of several of the plaintiffs to file objections.

Although the Supreme Court in *Abood* suggested that an internal union procedure might be an appropriate method of protecting objectors' rights, see 431 U.S. at 240, it was merely repeating a suggestion that had been made in a case under the Railway Labor Act. *Brotherhood of Railway & Steamship Clerks v. Allen*, 373 U.S. 113, 122 (1963). That act, as it has been interpreted, both imposes on the union a duty to represent dissenters fairly and creates remedies for violation of that duty. Probably, as we said earlier, the Illinois act imposes the

same duty. But that is not certain. Maybe under Illinois law the union has no duty to nonmembers. This possibility casts doubt on the adequacy of a grievance procedure controlled by the union.

The problem would not be so serious if there were an independent arbitrator at the end if not at the beginning of the process. But the arbitrator is picked by the union. It is true that he is picked from a list which, we are told, contains about 50 names, thus confining the union's choice somewhat. But even if the Illinois law imposes on the union the identical duty of fair representation that the union would have if it were subject to the Railway Labor Act or the National Labor Relations Act, the union's relationship to dissenting members of the bargaining unit would, as a realistic matter, contain a sufficient residue of adverseness to raise serious objections to giving the union a unilateral choice of arbitrator. "The union's interests and those of the individual employee are not always identical or even compatible." *McDonald v. City of West Branch*, 104 S. Ct. 1799, 1804 (1984); see *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981).

There are 15 federal district judges in active service in the Northern District of Illinois, all unimpeachably accredited; and yet the union would not try to defend a procedure that let it (or the dissenters!) pick the judge to preside in this case. See *United States v. Bursten*, 560 F.2d 779, 786 (7th Cir. 1977) (per curiam); *Barnes v. United States*, 241 F.2d 252, 254 (9th Cir. 1956); *United States v. Garrison*, 340 F. Supp. 952, 956 (E.D. La. 1972). "Next to the impropriety of being Judge in one's own cause, is the appointment of the Judge." 2 Records

of the Federal Convention of 1787, at 82 (Farrand rev. ed. 1937) (remarks of Gouverneur Morris). The situation here is even more troublesome. The arbitrator, unlike a federal judge, is not paid a salary that is independent of the number of cases he presides over, or of the goodwill of a litigant. The arbitrator is paid for each arbitration, and this gives him a financial interest in deciding cases favorably to the union—which hires him, and incidentally which pays him. "[N]o man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955); see also *Brown v. Vance*, 637 F.2d 272, 276 (5th Cir. 1981).

Another problem is that the arbitrator is required to decide whether union activities are political or ideological, on the one hand, or germane to the union's collective bargaining responsibilities on the other. And as these are not mutually exclusive categories he must also decide whether certain political or ideological activities are so intrinsic to the union's responsibilities as collective bargaining agent that the union should be allowed to force the dissenters to contribute to their expense. In *McDonald v. City of West Branch, supra*, the Supreme Court held that an arbitrator's determination that a public employee had been fired for cause was not entitled to collateral estoppel effect in the employee's subsequent 1983 suit for wrongful discharge, a suit based on an alleged violation of the First Amendment. This result suggests that the Supreme Court doubts the competence of arbitrators—whose area of expertise, after all, is the interpretation of contracts rather than the interpretation of the Constitution—to make First Amendment determinations. Compare 104 S. Ct. at 1803 with *Parrett v. City of Connersville*, 737 F.2d 690, 696-97 (7th Cir.

1984). But that is what the arbitrator would have to do in any case where the dissenter objected that the agency fee that he was forced to pay was being used for impermissible political or ideological purposes.

The procedure that the defendants adopted in this case is constitutionally inadequate, and they must go back to the drawing board. But it would be unhelpful of us to leave the parties and the district court without any guidance. Without wanting to be dogmatic or to foreclose consideration of alternative procedures, we suggest that the constitutional minimum would be fair notice, a prompt administrative hearing before the Board of Education or some other state or local agency—the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies—and a right of judicial review of the agency's decision. The combination of an internal union remedy and an arbitration procedure is unlikely to satisfy constitutional requirements given the nature of the issues to be decided and the union's stake in how they are decided.

The plaintiffs have a separate objection to the remedy that the existing procedure provides for those who invoke it successfully. The remedy is a rebate of the amount of the agency fee improperly deducted and a reduction in future deductions (the latter aspect of the remedy is not controversial). During the period between the deduction and the rebate, the union has the use of the dissenter's money, interest free. This means that even if the dissenter wins, some of his money—the amount being measured by the value to the union of having this interest-free loan—ends up supporting the union's political activities. *Ellis v. Brotherhood of Railway*

Clerks, supra, 104 S. Ct. at 1890, makes clear that such a rebate procedure is inadequate even if the union pays interest on the amount deducted, for "even then the union obtains an involuntary loan for purposes to which the employee objects." True, *Ellis* was a case under the Railway Labor Act rather than under the due process clause of the Fourteenth Amendment. But the reason that the Railway Labor Act was interpreted to limit the use of agency fees was to avoid the serious constitutional questions that would have been raised otherwise. See *International Ass'n of Machinists v. Street, supra*, 367 U.S. at 749-50; *Abood v. Detroit Board of Education, supra*, 431 U.S. at 219-20. We know from *Abood*, and have tried to make clear in this opinion, that the Constitution indeed requires the same safeguards for dissenters' rights as the earlier cases found were required by the federal labor statutes. It follows that *Ellis* is as good a precedent under the due process clause of the Fourteenth Amendment as under the Railway Labor Act. Therefore a procedure for protecting the rights of dissenters is not constitutionally adequate if it cannot make whole the dissenter who wins his case; and the rebate procedure in this case, like the one in *Ellis*, cannot.

It is true that in *Ellis* the union had made no effort to determine in advance what fraction of its dues was not pertinent to collective bargaining and therefore should not be charged to objecting nonmembers. But that is an immaterial difference, at least on the facts of this case. A union cannot just choose some level of agency fee and, if it chooses too high, have the use, interest free, of the excess that it is later ordered to refund, until it refunds it. In *Robinson v. New Jersey*, the Third Circuit found that a 15 percent advance reduction for nonmembers of

the union provided a sufficient cushion to protect them. See slip op. at 33 n. 12; cf. Developments in the Law, *Public Employment*, 97 Harv. L. Rev. 1611, 1733 n. 59 (1984). Here the advance reduction was only 5 percent.

The Court in *Ellis* suggested, as an alternative to the procedure that it invalidated, placing the dissenters' money in an escrow account in a bank or trust company while the legitimacy of the union's proposed use of it is being determined. 104 S. Ct. at 1890. Then the union gets no use out of the money unless it wins its dispute with the dissenter; but since it does get the money if it wins, together with any accrued interest, it has an incentive to place the escrow fund at a high interest rate, and its rights and those of nondissenters are protected along with the dissenters' rights. The union's counsel told us at oral argument that after this case was brought the union began voluntarily placing dissenters' agency fees in escrow. This was a step in the right direction but does not make the issue moot. The union has made no commitment to continue to place such fees in escrow and has not indicated what the terms of the escrow are. The terms cannot be left entirely up to the union. The union might decide, for example, to forgo a high interest rate in order to punish dissenters (even though it would be punishing itself at the same time). It would be best if the union turned management and not just custody of the account over to a bank or trust company. But we need not go into those details here. It is enough to hold that a proper escrow arrangement is required in order to protect the dissenters' constitutional rights.

There are two loose ends to be tied up, and we are done. First, the plaintiffs argue that the Illinois statute

(cited earlier) authorizing agency fees in collective bargaining contracts negotiated with school boards is unconstitutional because it fails to set forth constitutionally adequate procedures—or indeed any procedures—for determining dissenters' objections. We do not understand this argument. When the Board, pursuant to our decision, creates such procedures, the plaintiffs will not be able to complain just because those procedures are not written into a statute. Second, the Board of Education argues that it has a good-faith immunity from suit. Although this defense was alluded to in the Board's answer to the complaint, it appears to have been abandoned in the course of the proceedings in the district court (though this is not certain); and the court did not mention the issue in its opinion. Even if the Board has immunity, this would not affect the plaintiffs' right to an injunction and attorney's fees. See *Pulliam v. Allen*, 104 S. Ct. 1970 (1984). The plaintiffs are seeking damages as well, but from the union as well as the Board, and the union is not immune. Cf. *Tower v. Glover, supra*, 104 S. Ct. at 2824-25. It is speculation at this stage whether the plaintiffs will attempt to get a damage judgment entered against the Board as well. Our uncertainty over whether immunity will ever be a live issue, the possibility that the issue was abandoned in the district court, and the fact that the district judge did not address it in his opinion persuade us not to deal with it either. The Board can if it wants try to renew the defense on remand; we make no prediction of its success in such an effort.

We reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion. Circuit Rule 18 shall not apply.

FLAUM, *Circuit Judge*, concurring in the result. I agree with the majority opinion only insofar as it holds that the Chicago Teachers Union (CTU) plan for arbitration and rebate of agency fees violates the constitutional rights of those employees as the plan relates to fees used to finance political and ideological expenses of the CTU. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court held that nonunion employees could not be compelled to contribute to political or ideological activities of a union. The majority in this case reaches a step further and creates a constitutional right not to be compelled to contribute to any activities that are not germane to collective bargaining, regardless of whether the activities are political or ideological. The majority further holds that the CTU plan is invalid in allowing for arbitration and rebate of those fees. I believe that we need not reach these issues.

A.

In 1981, the Illinois legislature passed a statute allowing local school boards to include in collective bargaining agreements a provision requiring nonunion employees "to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members." Ill. Rev. Stat. ch. 122 ¶ 10-22.40(a). The Chicago School Board and the CTU included such a provision in their collective bargaining agreement effective September 1, 1982. That provision states in pertinent part:

> All full-time employees covered by this Agreement who are not members of the UNION shall . . . pay

> to the UNION each month their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required by members of the UNION.

Agreement Between the Board of Education of the City of Chicago and the Chicago Teachers Union, Article 1, § 8.2 (hereinafter "agreement"). The CTU calculated its agency fee, and then adopted its plan for arbitration and rebate of fees by nonmembers. The plan allows non-union members to object only to

> any expenditure of his or her proportionate share payments for political activities or causes, or for activities or causes involving ideological issues not germane to the collective bargaining process or contract administration.

Plaintiffs allege that, in calculating its agency fee, the CTU included expenses that are not related to collective bargaining and contract administration. In their complaint, plaintiffs raised several pendent claims under the Illinois Constitution and under the state statute. In the district court and on appeal, however, plaintiffs have focused on federal constitutional challenges to the agency fee scheme. They argue that the inclusion of any such expenses, regardless of whether the expenses are political or ideological in nature, violates their first and fourteenth amendment rights. They further argue that the CTU arbitration and rebate plan violates these rights.

The district court did not determine whether the inclusion of the challenged expenses was constitutional. The

court held that the arbitration and rebate procedure was constitutionally adequate, and it ruled that all disputes over included expenses would have to be determined initially through that procedure.

B.

Plaintiffs have alleged that a portion of their agency fee is being used to pay for political and ideological activities of the union that are unrelated to collective bargaining and contract administration. It is clear that such an allegation states a cause of action for a violation of their constitutional rights of free speech and free association. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Where nonunion members state such a cause of action, the constitution entitles them to a procedure that prevents their compulsory subsidization of the impermissible union activity without unduly restricting the union's ability to require them to pay their fair share of the cost of permissible activity.. *Id.* at 237.

Both the procedure and remedy of the CTU rebate plan fail to meet this standard. The procedure relies on an arbitrator to determine whether expenses are ideological or political and thus cannot be charged to nonunion members. This involves "difficult problems in drawing lines," *id.* at 236, of constitutional origin. The Supreme Court has recently held that an arbitration award cannot be given preclusive effect in a section 1983 suit, *McDonald v. City of West Branch*, 104 S. Ct. 1799, 1804 (1984), reasoning that because of institutional limitations on the arbitration process, arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights."

Id. at 1803. Institutional limitations include the fact that most arbitrators are not lawyers, that an arbitrator's authority extends only to enforcing the terms of the contract, and that arbitral fact-finding is not equivalent to judicial fact-finding. *Id.* at 1803-04. These same limitations also make arbitration an inadequate forum for drawing lines as to permissible expenses based on the first and fourteenth amendments. Because arbitration may not protect constitutional rights, the CTU procedure is invalid.

The remedy—a rebate of the fee improperly deducted—also is constitutionally invalid. A rebate procedure allows the union temporary use of money for activities that violate nonunion members' rights. The temporary use of funds for improper purposes injures plaintiffs in two ways: it causes them to subsidize ideas with which they disagree; and it depletes their funds available for supporting causes with which they agree. *See Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality opinion); *see New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). There are clearly less restrictive alternatives for the union. *See Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 104 S. Ct. 1883, 1890 (1984). Thus, the rebate system is improper. *See Abood v. Detroit Board of Education*, 431 U.S. at 244 (Stevens, J., concurring).

C.

The majority opinion holds that the CTU's inclusion

of any expenses that are not germane to collective bargaining but that are not political or ideological in nature violates plaintiffs' fourteenth amendment "liberty of association." *See ante* at 7-9. From this, it holds that the CTU procedure is unconstitutional in that it does not ensure that the deprivation of liberty does not go further than is necessary.

No other federal appellate court has yet reached the issue of whether nonunion members have a constitutional right not to be charged for expenses that are not germane but not political or ideological. I also do not reach this issue. It is clear that both the Illinois statute and the agreement prohibit the inclusion of any expenses other than the cost of collective bargaining and contract administration. The CTU procedure allows the plaintiffs' fees to be used temporarily for purposes that violate the statute and the agreement. It is possible that by allowing this, the procedure itself may violate the statute and/or the agreement. *Cf. Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 104 S. Ct. at 1889-90 (union rebate plan violates Railway Labor Act by allowing for temporary use of fees collected in violation of Act).

It is a fundamental doctrine of federal adjudication, founded on strong prudential considerations, that a federal court should not resolve constitutional questions when an issue can be resolved on statutory or other grounds. This doctrine has been applied repeatedly where the nonconstitutional ground is a pendent state law claim. *See Hagans v. Lavine*, 415 U.S. 528, 546 (1974) ("[t]he Court has characteristically dealt first with possibly dispositive state law claims pendent to federal

constitutional claims") and cases cited therein; *Schmidt v. Oakland Unified School District*, 102 S. Ct. 2612 (1982) (per curiam); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 173, 193 (1909) (doctrine of deciding state pendent claim before reaching federal constitutional issue "is not departed from without important reasons"); *cf. Hutchinson v. Proxmire*, 443 U.S. 111, 122 (1979). Moreover, the Supreme Court has repeatedly determined the validity of union security plans on statutory grounds before reaching constitutional issues. *See Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 104 S. Ct. at 1890; *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961). I find no reason to depart from the doctrine here. To say that plaintiffs here have not pressed their pendent claims as grounds for disposition of this case cannot justify a different approach. If it did, parties could in effect always force federal courts to reach constitutional issues by the simple expediency of failing to press, or even to plead in the first instance, statutory grounds.[1] It is for the courts, and not for the parties, to

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[1] This approach, in my view, does not conflict with the Supreme Court's holdings in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) and *Monroe v. Pape*, 365 U.S. 167 (1961), that exhaustion of state remedies is not required prior to bringing suit in federal court under 42 U.S.C. § 1983. Those cases hold that exhaustion is not a jurisdictional prerequisite to bringing suit in federal court. Nothing in those cases, or in their reasoning, requires a federal court to reach novel issues of constitutional law where an issue may be addressed on state statutory grounds.

The majority states that "[p]endent jurisdiction is not compulsory." *Ante* at 4. It is of course clear that pendent jurisdiction is not compulsory as to the court; the district court has discretion to dismiss pendent claims. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The majority suggests, however, that pendent jurisdiction is not compulsory as to the parties. This in effect is inconsistent with this court's holding in *Harper Plastics v. Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir.

determine when a decision on constitutional grounds is both necessary and appropriate.

Whether the CTU procedure violates the statute or the collective bargaining agreement are questions purely of state law. Moreover, the parties have not argued this issue either in the district court or on appeal. Thus, I deem it inappropriate to consider these issues for the first time here. I would remand to the district court for a determination of whether this issue can be resolved on statutory or contractual grounds. *See Ruslan Shipping Corp. v. Coscol Petroleum Corp.*, 635 F.2d 648, 651-52 (7th Cir. 1980). *Cf. Abood v. Detroit Board of Education*, 431 U.S. at 236 n.33 (Court ruled that it would not determine whether use of fees for "social expenses" was unconstitutional but would leave issue to state courts).

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1981), that a federal court judgment on federal law issues will, as res judicata, preclude a subsequent state court suit where the state claims could have been brought as pendent claims in the federal suit. The court rejected the argument that the uncertainty that the federal court will exercise pendent jurisdiction justifies the failure to bring pendent claims. "We fail to discern the unfairness in requiring a plaintiff to join all relevant theories of relief in a single proceeding." *Id.* at 946. The federal claim in *Harper Plastics* was based on the antitrust statutes. The Ninth Circuit has applied *Harper Plastics* to bar a state court suit where the federal suit was brought in part under 42 U.S.C. § 1983. *Midkiff v. Tom*, 725 F.2d 502 (9th Cir. 1984).